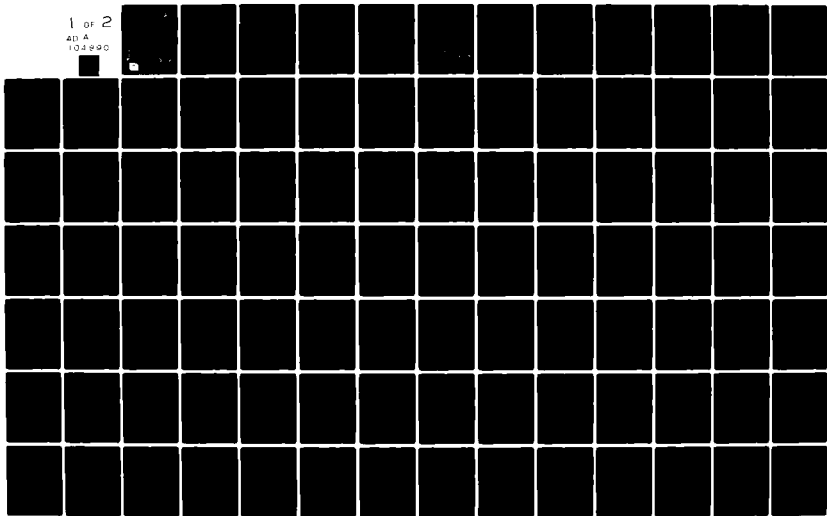


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**THE ROLE OF DoD IN EXPORT CONTROL
AS DEFINED BY
THE EXPORT ADMINISTRATION ACT OF 1979**

Forrest R. Frank

March 1981

Prepared for
Office of the Under Secretary of Defense for Research and Engineering

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AS DEFINED BY
THE EXPORT ADMINISTRATION ACT OF 1979

Forrest R. Frank

March 1981



INSTITUTE FOR DEFENSE ANALYSES
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ABSTRACT

The study presents and interprets the legislative history of national security export controls embodied in the Export Administration Act of 1979. It reviews in detail the evolution of the requirement for the development of a Militarily Critical Technologies List (MCTL). The study also speculates on possible uses of the MCTL by various constituencies, comments on the need for further Congressional clarification of the Export Administration Act, and assesses the utility of the critical technologies approach to export control.

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EXECUTIVE SUMMARY

A. BACKGROUND TO THE STUDY

The following study was undertaken in support of the Export Control Project of the Institute for Defense Analyses. The study presents a brief legislative history of the Export Administration Act of 1979. The legislative history presents one perspective on the intent of Congress in mandating a critical technologies approach to the control of exports of dual-purpose products and technologies from the United States which might contribute to the military potential of other nations to the detriment of United States national security.

The study is intended to aid interpretation of those portions of the Export Administration Act of 1979 bearing on the responsibilities of the Department of Defense for national security export controls. In addition, the study provides background information with respect to the broader range of export control issues foremost in the minds of prominent and influential members of Congress during the period in which the Export Administration Act of 1979 was drafted. The study also examines possible uses of the list of militarily critical technologies. The study identifies several issues on which the Department of Defense may wish to seek further guidance from the Congress. It also raises several issues which may merit further study and analysis by DOD and its contractors. Finally, the study offers some personal observations on the utility of the critical technologies approach to export controls.

B. KEY FINDINGS OF THE STUDY

1. Background to the Legislation

The study attempts to place the Export Administration Act of 1979 into a broader legislative context. This report concludes that the Export Administration Act of 1979 represents a shift in basic export control philosophy of the Congress from a predominantly free-trade orientation characteristic of the Export Administration Act of 1969 and subsequent legislation enacted in 1972, 1974, and 1977 toward a more control-oriented philosophy characteristic of the Export Control Act of 1949 and the Mutual Defense Assistance Control Act of 1951.

The study finds that Congressional consideration of the Export Administration Act was significantly influenced by debates on related export control legislation. Specifically, debates on the International Security Assistance and Arms Export Control Act of 1976, the International Security Assistance Acts of 1977, 1978, and 1979, and the Nuclear Nonproliferation Act of 1978 impacted on the climate and the specific issues considered during debate on the Export Administration Act of 1979. The 1976 Presidential campaign also significantly affected debate on the Export Administration Act of 1979.

2. Key Provisions of the Export Administration Act of 1979

The study reports the following conclusions with respect to the major provisions of the Export Administration Act of 1979 bearing on national security export controls:

- The basic authority of the President to invoke national security export controls is global in scope, even though implementing Executive Branch regulations and administrative practices do not reflect the full authority conferred by statute on the President.
- Congress intends that special emphasis be placed on the evaluation and control of technology in the implementation of national security export controls.

- Congress continues to find that there are some products which retain intrinsic military value despite their predominantly civil applications and which continue to require appropriate national security export controls.
- Congress intends that the unrestricted availability of products and technologies from sources outside the United States which are comparable in quality and available in significant quantity compared with products or technologies available from United States sources be taken into consideration in evaluating the need for or level of control applied to exports from the United States.
- Congress intends that the Secretary of Commerce establish a list of commodities and technologies subject to national security export controls; Congress further intends that the Secretary of Defense advise and give his consent to the products and technologies placed on the list of products and technologies to be subject to national security export controls.
- Congress intends that the Secretary of Defense prepare a list of militarily critical dual-purpose technologies as well as keystone materials, keystone equipment, and specific products containing transferable know-how of military significance. Congress further intends that this list of militarily critical technologies be sufficiently specific to be used in processing export license applications and developing appropriate export control mechanisms.
- Congress intends that export licensing activities and criteria be reviewed frequently to take into account developments of products and technologies at home and abroad which would reduce the efficacy and hence the need for export controls to maintain and enhance the national security of the United States.

- Congressional expectations of the use of the list of militarily critical technologies vary widely. Some members of Congress believe that a well-developed and elaborated list of militarily critical technologies will result in an increase in the number of products which may be sold to all nations without risk to the national security of the United States. Other members of Congress believe that the list of militarily critical technologies will result in an increase in the number of products as well as technologies which are embargoed outright or are subject to the most rigorous licensing possible because of new insights into the possible applications of either products or technologies in a manner detrimental to the national security of the United States.

3. Uses of the Militarily Critical Technologies List

The study identifies several possible uses of the Militarily Critical Technologies List (MCTL).

Possible uses by members of Congress and their staffs include the use of the MCTL

- as a point of reference for assessing the need for national security export controls including embargo for specific products or technologies;
- as a reference tool to verify claims of foreign capability; and
- as an aid to the analysis of other export control lists maintained by the United States Government on either a unilateral or a multilateral basis.

Possible uses by the Executive Branch identified in the study include the use of the MCTL

- to coordinate review of other export control lists maintained by the United States Government on either a unilateral or a multilateral basis;

- to allocate research and development resources, intelligence assets, and export control resources; and
- as a means of better explaining the military significance of and the need for national security or foreign policy export controls on selected products or technologies to the Congress, to industry, and to U.S. friends and allies.

Possible uses by industry include the use of the MCTL

- as a tool to allocate marketing resources at home and abroad; and
- as a means to reduce the volume and the burden of government regulation of economic activity.

4. Further MCTL Issues for DOD Consideration

The study identifies several topics on which DOD may find it desirable or necessary to seek further clarification from Congress over its role and responsibilities. Among those areas identified in the study are the following:

- the scope of export controls for national security purposes;
- the operational definition and standards of proof for "foreign capability";
- definitions and distinctions for export control purposes among goods, products, technology, services, and technical data;
- the need for and authority of DOD to participate in reviews and rectification of other export control lists maintained by the U.S. Government with the critical technologies approach embodied in the Export Administration Act of 1979; and
- the degree to which the criterion of foreign capability should be taken into account in assessing dual purpose products or technology for their military criticality.

DOD may find it useful to undertake several studies on its own initiative in order to better understand and implement the critical technologies approach to export control. Among the studies that are identified in the following report and that DOD may wish to consider are

- a review of other export control lists maintained by the U.S. Government to determine whether or not the critical technologies approach might be usefully applied to them; and
- a review of the intelligence requirements and resource implications of implementing the critical technologies approach to export controls.

5. Observations on the Utility of the Critical Technologies Approach to Export Control

The study concludes with an assessment by the author of the utility of the critical technologies approach to export control as embodied in the Export Administration Act of 1979. The author concludes that the critical technologies approach has merit at least as an analytical tool insofar as it helps identify those products and technologies which have special significance for U.S. military security. The critical technologies approach is also helpful in building a framework that takes the dynamic qualities of technology into account. The critical technologies approach is also helpful in that it permits examination of the cumulative and interactive effects of technologies among one another, highlighting the many different technological routes to a specific capability of military interest. The critical technologies approach requires continuing the evaluation of the American technological base, permitting careful and timely decisions with respect to the allocation of research and development resources.

The author concludes that implementation of the critical technologies approach to the problem of administering export

controls remains both a challenging assignment and a task that will not relieve analysts and decision makers from making difficult choices. The existence of an MCTL may aid analysts and decision makers in identifying difficult choices. It will not relieve them of the responsibility or the obligation to make those choices.

I. INTRODUCTION

Enactment of the Export Administration Act of 1979, Public Law 96-72,* represented at least a partial return to the more traditional, cautious attitude of the United States Congress towards the role of international trade with potential military adversaries as an integral part of American policy in the context of broader geopolitical contests. The following report presents one perspective on the origin and purposes of national security export controls embodied in Section 5 of the Export Administration Act of 1979.

Several other sections of the Export Administration Act of 1979 bear on the responsibilities of the Department of Defense (DOD) with respect to export controls. For example, Sections 2 and 3, discussed briefly below, present general findings and policies intended to guide DOD in the application of export controls. Section 4 mandates general decision rules with respect to application of the Act to problems of export controls common to DOD, the Commerce Department, and other agencies and departments involved in the administration of export controls. Section 10 outlines the authority and procedures to be used by DOD in exercising its veto rights over Commerce Department licensing decisions should Commerce ever approve export license applications contrary to DOD's advice. However, Section 5 of the Act now forms the basis of DOD participation in the export control process and will be the main focus of the following report.

*See appendix.

In addition to presenting one interpretation of the intent of the Congress in enacting Section 5 of the Export Administration Act of 1979, the report offers some tentative observations about possible uses of the Militarily Critical Technologies List (MCTL) mandated by the Act. Finally, the report raises issues which may require further elaboration and analysis if the Defense Department is to fulfill its new mandate under the Act.

The following report outlines the legislative history underlying those sections of the Export Administration Act of 1979 which serve as the basis for national security export controls. Understanding the origin of the language embodied in the statute may be of assistance in interpreting the law. Legislative history can be instructive to those who must convert hortatory language into operational definitions and procedures.

Legislative history may also aid senior officials within the Executive Branch in making effective appearances before Congress. The American political process is based on the rule of law, not the rule of men; legislative history therefore reinforces continuity of government, from one Congress to another, and from one Administration to another. Knowledge of the genesis of specific statutory language enables members of Congress and Executive Branch officials to deal with substantive and operational problems associated with the implementation of statute without unnecessary rancor, unproductive arguments, and time-consuming digressions during authorization, appropriation or oversight hearings, briefings, or other presentations.

The legislative history of the Export Administration Act of 1979 presented below is drawn from the public record of Congressional Committee and floor debates during the 96th Congress. In addition, the author has drawn on interviews and other sources of information which may not be accessible to scholars. The author does not contend that this study exhausts the entire legislative history of the Act, nor even that it completely

documents the history of those sections of the Act dealing only with national security export controls. Nevertheless, it is the author's intent to set forth the principal themes, arguments, counterarguments, and results in a manner that will facilitate careful analysis and implementation of the requirement that the Secretary of Defense prepare a list of militarily critical technologies for publication in the Federal Register not later than 1 October 1980.

I wish to acknowledge the generous assistance and helpful comments on an earlier draft of this report offered by Dr. Robert Widder, Dr. Ronnie Goldberg, Dr. William Thomas, and Dr. John Hardt. Special thanks are due to Mrs. Ruth Kumbar for technical support in the preparation of the manuscript. I also wish to thank Dr. Fred Riddell, Chairman of TWG-2, for his support and encouragement as well as his patience and stimulating conversations on the broadest range of export control issues. The following study would not have come to fruition were it not for his efforts; to him I owe special gratitude.

This report was prepared as background to the final report of the Institute for Defense Analyses (IDA) Export Control Project. It is based on oral presentations, memoranda, and other materials presented to Technical Working Group 2, chaired by Dr. Fred Riddell, the Project Director, Dr. Ronald Finkler, and the sponsoring Defense Department organization, Directorate of Defense Research and Engineering (International Programs and Technology).

The views expressed in the following report are solely those of the author and do not necessarily reflect the views of IDA, the Department of Defense, or the Congress of the United States.

II. EXPORT CONTROL LEGISLATION, 1949-1977

During the period 1949-1969, control of exports with both civil and military applications from the United States to potential military adversaries was based on the Export Control Act of 1949 as supplemented by the Mutual Defense Assistance Control Act of 1951 (also known as the "Battle Act").¹ These statutes, enacted during the height of the Cold War, reflected the prevailing view of the time that any Soviet or Eastern European economic growth or development would ultimately contribute to the military capability of the Soviet Union and its allies and was therefore to be inhibited, discouraged, or forbidden outright. Accordingly, the sale of nearly all products or technology to the Soviet Union, its European allies, and the People's Republic of China (PRC) was embargoed.

During the 1960s, however, economic growth in the centrally planned economies of the Soviet Union, Eastern Europe, and the PRC occurred, new markets were opened, and trade between the West and the East increased. During this period, many of the political inhibitions against trade with the Soviet Union and its allies abated, and American industry began to chafe under the restrictions imposed by these two statutes.²

Accordingly, in 1969 the Congress enacted the Export Administration Act. This statute, premised on the belief that increased trade with the Soviet Union and its allies might ameliorate broader political conflicts, facilitated substantial growth in U.S.-Soviet and -Eastern Europe trade.³ While the 1969 Export Administration Act maintained a set of export controls to prevent or inhibit the transfer of goods or technologies which might make a substantial contribution to the

military capabilities of any country or combination of countries that would prove detrimental to U.S. national security, the primary intent of the statute was to facilitate international commerce between the United States and the centrally planned economies of Eastern Europe.⁴

In 1972, the Export Administration Act was amended slightly to encourage closer cooperation between the United States Government and the private sector in determining which products or technologies should be permitted to be exported to the Soviet Union, its allies and other centrally planned economies in Asia. The amended statute also instructed the Secretary of Commerce to remove export controls imposed for national security reasons on those goods and products which were available to potential military adversaries without comparable restrictions from foreign sources. The new statutory requirement that exports be permitted where foreign availability of products could be demonstrated became and remains one of the most controversial elements of the Export Administration Act.⁵

By 1974, however, it had become clear that the improvements in political relations between the United States and the Soviet Union, though imminent in 1969, had not taken place, and several amendments to the 1969 statute were adopted. Among the most significant amendments adopted was a provision giving the Secretary of Defense the authority to veto export licenses granted by the Commerce Department in the event that such exports would, in the opinion of the Secretary of Defense, be harmful to the national security of the United States.⁶

At the same time, the Congress imposed stringent 90-day time limits on the processing of license applications. This was intended to speed up the United States regulatory process and make U.S. firms more competitive with non-U.S. sources of goods or technology.⁷

In 1977, the mood of the Congress continued to be guardedly optimistic about the value of East-West trade not only in terms

of its economic importance to the economy of the United States, but also in terms of its importance to the amelioration of political conflicts between the United States and the Soviet Union. Congress amended the 1969 Export Administration Act making clear that export controls were to be applied to those countries which might pose a national security risk to the United States; furthermore, Congress made clear that exports to a country governed by a communist party could not be controlled on national security grounds solely because of that fact. Rather, exports to a communist country could be controlled on national security grounds only if that government demonstrated other hostile attitudes or actions toward the United States or its allies or a failure to abide by the terms and conditions of export licenses granted in the past.⁸

Consideration of further legislation reauthorizing the regime of export controls in a revised basic statute began almost as soon as action was completed on the Export Administration Act Amendments of 1977. By 1977, however, the domestic and international political climate in which the question of export controls was to be debated had changed substantially. Let us turn to a brief consideration of the milieu in which the Export Administration Act of 1979 was drafted.

REFERENCES AND NOTES, CHAPTER II

¹See, for example, U.S. Congress, Office of Technology Assessment, Technology and East-West Trade, Washington, D.C., U.S. Government Printing Office, 1979, pp. 112-114.

²See U.S. Congress, Senate Committee on Banking, Housing, and Urban Affairs, The Export Administration Act of 1969, Washington, D.C., U.S. Government Printing Office, 1969, and U.S. Congress, House Committee on Banking and Currency, Extension of the Export Control Act, Washington, D.C., U.S. Government Printing Office, 1969.

³U.S. Congress, Senate Committee on Banking, Housing and Urban Affairs, Report to Accompany S. 2696, Export Expansion and Regulation Act of 1969, Washington, D.C., U.S. Government Printing Office, 1969, and U.S. Congress, House Committee on Banking and Currency, Report to Accompany H.R. 4293, Export Control Act Extension, Washington, D.C., U.S. Government Printing Office, 1969.

⁴Debate on the Export Administration Act of 1969, Congressional Record, Annual Compilation, House debate, October 16, 1969, pp. 30404-30425, December 10, 1969, pp. 38077-38108, Senate debate, November 14, 1969, pp. 34289-34293, 40982-40987.

⁵U.S. Congress, Senate Committee on Banking, Housing and Urban Affairs, Report to Accompany The Equal Export Opportunity Act and the International Economic Policy Act of 1972, Washington, D.C., U.S. Government Printing Office, 1972, pp. 2-4.

⁶U.S. Congress, Senate Committee on Banking, Housing and Urban Affairs, Report to Accompany S. 3792, Export Administration Act Amendments of 1974, Washington, D.C., U.S. Government Printing Office, 1974, p. 9; also, U.S. Congress, Conference Committee, Report to Accompany S. 3792, Export Administration Act Amendments of 1974, reprinted in United States Code Congressional and Administrative News, 93rd Congress, 2nd Session, 1974 (St. Paul, West Publishing Co. 1975), pp. 6243-6248, see also p. 6246.

⁷Conference Committee, Ibid., p. 6245.

⁸U.S. Congress, Senate Committee on Banking, Housing and Urban Affairs, Export Administration Act Amendments of 1977, Washington, D.C., U.S. Government Printing Office, 1977, p. 9.

III. BACKGROUND CONSIDERATIONS OF CONGRESS RELATING TO THE EXPORT ADMINISTRATION ACT OF 1979

The context in which the Export Administration Act of 1979 was considered by the U.S. Congress had its roots in the 1976 Presidential election on the one hand and the more general development of American economic interdependence with the rest of the world on the other. Several themes of the Presidential election were raised as issues for study by the Executive Branch as part of the 1977 Amendments to the Export Administration Act of 1969¹ with the understanding that these matters would be reviewed in greater detail as the Congress set about the task of extending the Export Administration Act in a more deliberative manner.

The 1976 Presidential campaign and its focus on the decline of U.S.-Soviet relations, perhaps best symbolized by President Ford's exorcism of the word "detente" from his vocabulary,² significantly shaped the nature of the debate on the 1979 law. As late as 1977, arguments linking improvements in overall U.S.-Soviet relations by means of trade could be heard in support of the Export Administration Act extension.³ The theme that significant (large) sales of advanced technology to the Soviet Union would undermine U.S. national security was introduced by supporters of Governor Reagan through the 1976 Presidential primary season,⁴ and was repeatedly struck throughout 1977 and 1978 in speeches before the House and Senate⁵ as well as in several hearings held to review controversial sales of technology to the Soviet Union.

Another theme of the 1976 Presidential campaign that was only slightly echoed in the 1977 legislation but figured

significantly in the context of the 1979 legislation was the keen interest of some members of Congress in limiting the proliferation of conventional weapons production know-how and capability, regardless of the peaceful or military nature of the basic production know-how.⁶ The hortatory language of the Arms Export Control Act, the provisions of Sections 36 and 37 of the act relating to foreign military sales and licensed production or coproduction and recoupment of U.S. military research and development costs, and the provisions of Section 38 of the Arms Export Control Act of 1976 governing commercial sales of items placed on the United States Munitions List could be viewed as intending to retard the transfer of weapons manufacturing capability from the United States to other nations.⁷ The theme of conventional arms transfer restraint figured prominently in the development of the requirement in Section 24 of the International Security Assistance Act of 1977⁸ necessitating a comprehensive review of U.S. Government technology transfer policies and practices. Furthermore, the interest in limiting the transfer of dual-purpose technologies peaked during the preparatory period for the U.N. Special Session on Disarmament⁹, which gave arms control advocates in the Congress and the Executive Branch another opportunity to examine the role of dual-purpose product and technology sales from an arms control perspective.

A third theme of the 1976 Presidential campaign significantly affecting the context in which the Export Administration Act of 1979 was formulated was the concern about the proliferation of nuclear weapons which figured so prominently in President Carter's campaign efforts.¹⁰ While this concern was largely resolved with enactment of the Nuclear Nonproliferation Act of 1978, the hearings held on nuclear nonproliferation throughout 1976 and 1977 in the context of reform and revision of the Export Administration Act once again underscored the national

security implications of dual-purpose technologies subject to export licensing by the Department of Commerce.

A fourth theme of the 1976 Presidential campaign that was woven into the fabric of the Export Administration Act of 1979 was the burden of government. While Congress had repeatedly urged and then instructed the Commerce Department to accelerate and streamline its processing of cases in the 1972 and 1974 laws, the Export Administration Act Amendments of 1977¹¹ mandated studies which were intended to serve as the basis for further Congressional action intended to solve once and for all the seemingly endless administrative problems associated with the export licensing process.

It was in this latter connection that the Defense Science Board under the leadership of J. Fred Bucy undertook a study of U.S. policy on the export of dual-purpose technology in 1974. The goal of the study was the development of a set of highly differentiated export controls that could be used to effectively protect the most important U.S. origin or U.S. controlled dual-purpose technologies from military applications by potential adversaries. The resulting study, "U.S. Export Policy--A DOD Perspective," published in 1976¹² and now known as the "Bucy Report," suggested that there was a subset of the set of all technologies that could be described as militarily critical, and primarily related to design and manufacturing know-how. This subset of technology enabled the United States to acquire weapon systems qualitatively superior to those of our potential adversaries. Alternatively, if the subset of militarily critical technologies were made available to our potential adversaries, the United States would lose the significant lead time advantage it then enjoyed.¹³

The Bucy Report touched off a major debate within the Congress. Advocates of stricter export controls interpreted the findings of the Bucy Report as requiring additional export controls on the sale of design and manufacturing know-how as well

as justifying continuing controls on the sale of products with intrinsic military applications. Advocates of relaxed export controls interpreted the Bucy Report as justifying controls on the sale of design and manufacturing know-how but also as justifying significant reductions in the level and intensity of controls applied to the sale of products, even if such products might have military applications.¹⁴

While the 1976 Presidential campaign raised many issues which were considered during the 1977 review of the Export Administration Act and in some cases were incorporated in the study requirements of that statute, many of the issues relating to the national security implications of the export of dual-purpose goods and technologies were put over until the Congress took up consideration of revision and extension of the Act in 1978. One issue, however, that also figured in the deliberations of the Congress over the Export Administration Act and that did not stem from the 1976 Presidential campaign but had its origins in broader Congressional interest was the role of U.S.-USSR scientific exchanges in the potential leakage of militarily significant technologies.

Concern over the degree to which the 1972 U.S.-Soviet bilateral science and technology agreement was being implemented to the mutual benefit of both countries was voiced at the outset of the agreement and grew throughout its first five years.¹⁵ By 1977, some members of Congress had concluded that the agreements were not being implemented equitably, and at least a subset of these members expressed the fear that significant leakage of militarily important information to the Soviets was occurring through such exchanges. The consideration of the Export Administration Act revisions by the Congress during 1978 and 1979 were also affected by this underlying concern.

In summary, the Congressional debate over extension and revision of the Export Administration Act as amended through 1977 took on a new coloration as the 2nd Session of the 95th

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Congress convened in January 1978. In the period 1949 to 1979, Congressional attitudes toward exports and trade with Communist nations underwent significant changes. The period 1949-1969 was marked by a dominant attitude of continuing economic warfare with Communist nations. During the period 1969-1974, this attitude was supplanted by a more benign view of East-West trade. During the period 1974-1979, the pendulum of Congressional opinion on East-West trade returned to a more cautious position, while concurrently concern began to mount about the proliferation of military capability resulting from the sale of dual-purpose technology that might be used against American interests or even American military forces.

The desire for stronger U.S. economic performance and the need to place increased emphasis on the role of exports in the U.S. economy led Congress to consider major revisions to the Export Administration Act in 1979. We turn now to a detailed consideration of the relevant sections of that statute.

REFERENCES AND NOTES, CHAPTER III

¹Sec. 117 of the Export Administration Act Amendments of 1977 required a report on multilateral export controls including an assessment of "the effectiveness of such multilateral export controls" and requiring the formulation of specific proposals "for increasing the effectiveness of such controls."

Sec. 118 required "an investigation to determine whether United States unilateral controls or multilateral controls in which the United States participates should be removed, modified, or added with respect to particular articles, materials, and supplies, including technical data and other information, in order to protect the national security of the United States."

Sec. 119 required a study "of the domestic economic impact of exports from the United States of industrial technology whose export requires a license under the Export Administration Act of 1969."

Sec. 120 required a study "of the transfer of technical data and other information to any country to which exports are restricted for national security purposes and the problem of the export, by publications or any other means of public dissemination, of technical data or other information from the United States, the export of which might prove detrimental to the national security or foreign policy of the United States."

See U.S. Congress, House Committee on Foreign Affairs and Senate Committee on Foreign Relations, Legislation on

Foreign Relations Through 1978, Volume II, Washington, D.C., U.S. Government Printing Office, 1979, pp. 145-146. See also U.S. Congress, House Committee on Foreign Affairs, Report to Accompany H.R. 5840, Export Administration Act Amendments of 1977, Washington, D.C., U.S. Government Printing Office, 1977, pp. 14-20, and 21.

²James M. Naughton, "Ford Says 'In Time' He Expects to Talk with Nixon on China," New York Times, March 2, 1976.

³Congressional Record Debate on the Export Administration Act Amendments of 1977, Congressional Record (Annual Compilation), House Action April 20, 1977, pp. 11417-11450.

⁴See, for examples, speeches and press conference remarks on international trade issues in The Presidential Campaign, 1976: Jimmy Carter, Washington, D.C., U.S. Government Printing Office, 1978; and, The Presidential Campaign, 1976: President Gerald R. Ford, Washington, D.C., U.S. Government Printing Office, 1979, passim.

⁵See, for examples, statements by the following members of the House and Senate: Rep. McDonald, Congressional Record, January 27, 1977, p. E395; Rep. Bauman, Congressional Record, March 28, 1977, p. E1816; Rep. Dornan, Congressional Record, April 4, 1977, p. E2039; Rep. Ichord, Congressional Record, May 11, 1977, p. E2931; Rep. Ashbrook, Congressional Record, p. H4318; Rep. Symms, Congressional Record, May 23, 1977, p. H4813; Senator Helms, Congressional Record, May 24, 1977, p. S8572; Rep. Rudd, Congressional Record, May 26, 1977, p. E3373;

Rep. Hyde, Congressional Record, June 1, 1977, p. E3402; Rep. Kemp, Congressional Record, June 3, 1977, p. E3515; Sen. Thurmond, Congressional Record, June 16, 1977, p. S10054; Rep. Ashbrook, Congressional Record, May 2, 1978, p. E2252; Sen. Moynihan, Congressional Record, July 12, 1978, p. S10517; Rep. Wolff, Congressional Record, September 14, 1978, p. H9786; Rep. Clarence Miller, Congressional Record, September 14, 1978, p. H9850; Rep. Richard Ichord, Congressional Record, September 14, 1978, p. H9787.

⁶See, for example, the Chairman's Foreword to U.S. Congress, Committee on International Relations, Issues Concerning the Transfer of United States Defense Manufacturing Technology: Coproduction, Manufacturing Licenses, and Technical Assistance Agreements, Washington, D.C., U.S. Government Printing Office, 1977. See also U.S. Congress, House Committee on International Relations, Hearings on Foreign Assistance Legislation, Part 2, Washington, D.C., U.S. Government Printing Office, 1977, passim.

⁷U.S. Congress, The Arms Export Control Act of 1976, P.L. 94-329, reprinted in U.S. Congress, House Committee on Foreign Affairs and Senate Committee on Foreign Relations, Legislation on Foreign Relations Through 1979, Volume I, Washington, D.C., U.S. Government Printing Office, 1980, pp. 279-311, especially pp. 280-281, and 299-306.

⁸See U.S. Congress, House Committee on Foreign Affairs, Hearings on Foreign Assistance, 1977, Part 2, Washington, D.C., U.S. Government Printing Office, 1977, and U.S. Congress, House Committee on Foreign Affairs, Report to Accompany H.R. 6884, International Security Assistance Act of 1977, Washington, D.C., U.S. Government Printing Office, 1977, p. 27. See

International Transfer of Technology: Report of the President to the Congress Together with Assessment of the Report by the Congressional Research Service of the Library of Congress, Washington, D.C., U.S. Government Printing Office, 1979.

⁹U.S. Congress, House Committee on Foreign Affairs, Hearings on the U.N. Special Session on Disarmament, Washington, D.C., U.S. Government Printing Office, and U.S. Congress, Senate Committee on Foreign Relations, Hearings on the U.N. Special Session on Disarmament, Washington, D.C., U.S. Government Printing Office, 1978.

¹⁰Jimmy Carter, "Nuclear Energy and World Order," Speech at the United Nations, May 13, 1976, in the Presidential Campaign, 1976: Jimmy Carter, op. cit. Vol. One, Part One, pp. 183 ff. See also, U.S. Congress, Joint Committee on Atomic Energy, Export Reorganization Act of 1976, Washington, D.C., U.S. Government Printing Office, 1976; U.S. Congress, Senate Committee on Government Operations, Export Reorganization Act of 1976, Washington, D.C., U.S. Government Printing Office, 1976.

¹¹See Note 1 supra.

¹²Defense Science Board Task Force on Export of U.S. Technology, An Analysis of Export Control of U.S. Technology--A DOD Perspective, Washington, D.C., Department of Defense, 1976.

¹³Ibid., pp. xiii-xvi.

¹⁴See, for example, U.S. Congress, Committee on International Relations, Export Licensing of Advanced Technology: A Review, Part II, Washington, D.C., U.S. Government Printing Office, 1976.

¹⁵See, for example, the Chairman's Foreword to U.S. Congress' Committee on International Relations, Technology Transfer and Scientific Cooperation Between the United States and the Soviet Union: A Review, Washington, D.C., U.S. Government Printing Office, 1977.

IV. THE EXPORT ADMINISTRATION ACT OF 1979

The Export Administration Act of 1979 continues to provide the legal basis on which most exports from the United States are subject to control. Three general rationales may be invoked by the President to control exports:

1. To preserve United States national security;
2. To further American foreign policy goals and objectives and conform to international agreements;
3. To protect the economy from inflation and shortages induced by exports of materials in short supply.¹

The Export Administration Act of 1979 also contains provisions limiting the exports of animal hides, scrap steel, and Alaskan oil. These provisions represent specific applications of more general concerns about short supply, and their inclusion in the statute as opposed to Commerce Department regulations attests more to the skill and sophistication of the specialized interests of the agricultural, steel, and energy communities than to the confidence or lack thereof the Congress has in the ability of the Department of Commerce to apply controls to those commodities.²

The Export Administration Act also contains several provisions bearing on the administration of export controls, including a rigid timetable during which license applications must be processed, provisions pertaining to the confidentiality of information furnished by exporters to the government on the one hand and provisions guaranteeing adequate recordkeeping and access by Congress to such records on the other.³ The law also contains provisions coordinating policy and administrative action with authorities provided other agencies and departments

pursuant to the Arms Export Control Act and the Nuclear Non-proliferation Act.⁴

The following is a section-by-section discussion of the evolution of the statute relying on the most authoritative sources--the House and Senate committee reports, the floor debates, and the conference report.

A. FINDINGS OF CONGRESS

Section 2 of the Export Administration Act contains findings with regard to the role of exports in the United States economy as well as the potential costs and benefits of export controls.

Two findings of the Congress listed in this section are especially relevant to understanding Congressional intent in mandating a critical technologies approach to export control.

Section 2(5) finds, "Exports of goods or technology without regard to whether they make a significant contribution to the military potential of individual countries or combinations of countries may adversely affect the national security of the United States."

This language, which is a slight modification of language drawn from the 1969 Export Administration Act as amended, conveys the sense of both the House and Senate that exports and their impact, or potential impact, on U.S. national security are a global concern, not a concern restricted to an individual country or a particular group of countries. One might therefore infer that Congress was concerned that national security considerations be taken into account in licensing exports of goods and technology on a global basis unless otherwise specified.

Section 2(8) finds that "It is important that the administration of export controls imposed for national security purposes give special emphasis to the need to control exports of technology (and goods which contribute significantly to the transfer of such technology) which could make a significant

contribution to the military potential of any country or combination of countries which would be detrimental to the national security of the United States."

This language, supplied in both the House and Senate committee reports, was intended to capture the essence of the Bucy Report, while taking into account the many criticisms and reservations voiced by critics of the report.⁵ Especially noteworthy are three points:

1. The scope of the concern is worldwide, i.e., "...any country or combination of countries ...;"
2. Special emphasis is to be placed on evaluation of technology in the administration of national security export controls; and
3. The Congress continues to find that there are some products which in fact would result in undesirable technology transfer that must also be carefully scrutinized.

While it is clear that the report of the Defense Science Board--the Bucy Report--had substantial impact on the findings of the Congress with respect to the need for export controls, it is also clear that members of both the House and Senate were less sanguine about the ability to market products without undue risk of technology transfer than were the members of the Defense Science Board. Members of Congress also understand the potential loss of American economic competitiveness resulting from technology transfer and specifically encouraged that products which transfer technology controlled to any destination on national security grounds be reviewed for their long-term economic competitiveness implications in addition to their inherent military potential.

During the course of floor debate in the House, Rep. Solomon of New York raised the issue of distinguishing between any increase in military potential of foreign governments as a result of American exports as opposed to any significant increase in such capabilities. Rep. Solomon took the position that the Commerce

Department was incapable of determining whether or not an increase in military potential arising from U.S. exports to a foreign nation was or was not significant, and urged that the term be deleted from Sections 2(5) and 2(8) as the law was enacted.⁶

Rep. Ichord disagreed with Rep. Solomon, noting that the effect of his amendment might be to curtail all exports. Said Ichord, "I am afraid it might prohibit the export of any item. What I am concerned about, I would say to the gentleman, is the export of critical military technology ... I do not know if you could administer the law if significant is removed."⁷

Representatives Bingham, Wolff, and Lagomarsino agreed with Rep. Ichord, and the Solomon amendment was defeated.⁸

Hence, even when examining whether or not U.S. exports add to the military potential of other nations, the test for controlling such exports is that such exports make a significant contribution. This issue arose specifically during the recent dispute over the military significance of the export of truck manufacturing capability to the Soviet Union for installation at the Kama River truck manufacturing facility.⁹

B. DECLARATION OF POLICY

Section 3 of the Export Administration Act enunciates the general policy guidelines governing the use of export controls as well as the goals such controls are intended to achieve. Three specific declarations of policy are relevant to the application of national security export controls.

Section 3(2) declares that it is U.S. policy to (a) "...restrict the export of goods and technology which would make a significant contribution to the military potential of any other country or combination of countries which would prove detrimental to the national security of the United States;" and (b) "...restrict the export of goods and technology where necessary to further significantly the foreign policy of the

United States or to fulfill its declared international obligations."

The language of Section 3(2)(A) and (B) was reported by both the House and Senate committees and was intended to underscore the global scope of national security controls and the focus on technology and goods, and in conjunction with other subsections of Section 3, to emphasize the importance of exports to the United States economy.

Section 3(6), which declares "...the policy of the United States that the desirability of subjecting, or continuing to subject, particular goods or technology or other information to United States export controls should be subjected to review and consultation with representatives of appropriate United States Government agencies and private industry...", resulted from Senate Banking Committee deliberations. The language was reported by the Senate Banking Committee and was accepted by the House in the Conference Committee.

The Senate Banking Committee intended that this policy apply to all export control requirements. Furthermore, consultations between government and industry should be used to aid the Departments of State and Commerce in developing alternatives to site visitations as a means of verifying compliance with end-use restrictions. As the Senate Banking Committee Report notes, "Site visitations are a burdensome expense for smaller firms and the committee urges consideration by the Department of Commerce of alternative, less expensive, ways to verify end use."¹⁰

Section 3(9) sets forth U.S. policy with regard to cooperation with other nations on national security controls: "... It is the policy of the United States to cooperate with other countries with which the United States has defense treaty commitments in restricting the export of goods and technology which would make a significant contribution to the military potential of any country or combination of countries which would prove detrimental

to the security of the United States and of those countries with which the United States has defense treaty commitments."

The language of Section 3(9) was favorably reported by both the House and Senate. This declaration of policy serves as a replacement for the declaration of policy found in the 1951 Mutual Defense Assistance Control Act (the Battle Act), and is intended to serve as the basis for U.S. participation in COCOM.* This subsection would further authorize the President to coordinate export controls with other American allies such as Australia, New Zealand, and South Korea, should the need arise.

Section 3(10), added by the House Foreign Affairs Committee, reiterates the finding of the Congress that exports are important to the economy of the United States. As that committee noted in its report, the paragraph emphasizes "...the priority of exports and the importance of limiting export controls, applying them according to basic standards of due process, and justifying them to the Congress and the public." Hence, the burden of proof for the need to control exports rests squarely on the Government, and the standard of proof required to control exports, while not as rigorous as "beyond a reasonable doubt" used in criminal cases, is probably as rigorous as the standard of "preponderance of evidence" used in civil matters.¹¹

Congress appears to have been concerned about the development of export controls to maintain U.S. national security from a broad perspective. Congress sought an export control regime that recognized both military and economic security components to U.S. national security. Furthermore, the Congress appeared to recognize that threats to U.S. national security, broadly conceived, were potentially global in character, requiring an analytical basis for the application of a differentiated set of export controls.

*Export controls maintained jointly by the U.S., its NATO allies and Japan, excluding Iceland, through the informal Coordinating Committee, COCOM.

C. GENERAL PROVISIONS OF THE EXPORT ADMINISTRATION ACT

Section 4 of the Export Administration Act of 1979 sets forth the general provisions of the law, including types of export licenses, the authority for the Secretary of Commerce to establish the Commodity Control List, a general limitation on the authority of the President to impose controls in the event that foreign availability of goods and technology is found to exist, a presumptive right of exporters to export, a limitation on Presidential delegation of authority, and a general requirement that the Secretary of Commerce keep the public informed.

Section 4(a) sets forth three major categories of license. Use of three categories of license was mandated by both the House and the Senate to improve control where necessary and to reduce delay and the burden on exporters imposed by the export control process where goods or technology not deemed "critical" were involved.¹² The House report noted, for example,

Validated and general licenses are currently in use. Over 95 percent of U.S. manufactured goods exports take place under general license without the necessity of any application. Most of the remainder occur under validated licenses, which require a specific application for each transaction. While the Commerce Department has instituted limited "bulk licensing" procedures for exports to free world destinations, there is no commonly employed intermediate type of license, applicable to both communist and non-communist destinations, which permits a greater degree of control than is possible with general license procedures without excessive paperwork required by validated license procedures.¹³

The House Foreign Affairs Committee concluded that introduction of an intermediate type of license for "relatively low technology items" that Commerce had been approving routinely for export under a validated license would reduce the burden of licensing on both exporters and the Commerce Department.

Through the use of qualified general licenses with these conditions, close monitoring and constraints on exports can be maintained while bureaucratic paperwork and duplication of effort can be greatly reduced. It is the Committee's view that this type of license could be used quite widely, with positive results for both the integrity and efficiency of national security controls.¹⁴

The Senate Banking Committee shared this general view of the use of the qualified general license, noting in its report, "The committee believes the number of separate licenses required and the attendant paperwork and expense for both applicants and the Government can be greatly reduced without reducing the effectiveness of export controls, by the adoption of qualified general license requirements in place of validated license requirements whenever feasible and appropriate."¹⁵

Section 4(b) authorizes the Secretary of Commerce to maintain the Commodity Control List "...consisting of any goods or technology subject to export controls under this act." Such a list would include items controlled for national security purposes, foreign policy purposes, counter-terrorism purposes, and domestic short supply reasons.

Section 4(c) instructs the President to refrain from imposing export controls if he determines that goods or technology are available without legal, administrative, or political restrictions from sources outside the United States in significant quantities and of comparable quality to those produced in the United States. Foreign policy or national security controls may not be imposed unless the President determines that adequate evidence has been presented to him demonstrating that in the absence of export controls the foreign policy or the national security of the United States would be harmed.

This provision in both the House and Senate Committee bills was intended to put the Secretary of Commerce and the President

in a position to continually monitor foreign availability, and to limit the application of export controls to those goods or technologies for which no foreign availability was found. As noted in the House report, "Often, foreign availability is not found because it is not looked for, and it is not looked for because of an absence of incentives in the bureaucracy to look for it."¹⁶

Section 4(d), asserting a positive presumption of legal ability of exporters to export, was originally introduced in the Senate Banking Committee bill. The Senators felt that the statutory basis for limiting exports should be made especially clear, thereby enabling exporters and government officials to resolve their disparate interpretations of law in favor of exporters in a simple, expeditious manner.¹⁷

Section 4(e) limits the authority of the President to delegate responsibility for administration of the Export Administration Act to officers and employees of the U.S. Government but not to any official of any department or agency whose head is not appointed by or with the advice and consent of the Senate.

The House originally passed the House Foreign Affairs Committee version of the bill, which repealed a similar prohibition in the 1969 Export Administration Act.

The Senate, on the other hand, retained and made even clearer the limits on the authority of the President to delegate authority under this statute. The Banking Committee noted in its report, "The Committee intends the provision to apply in particular to the staff of the National Security Council who are reported to have been assigned a role in formulating export control policy and in reviewing particular export license applications. The expanded role of the NSC staff in export licensing and export control policy has frustrated effective Congressional oversight because the officials refuse to testify before Congress and the memoranda and papers prepared by the NSC staff are not available to the Congress."¹⁸

The House receded to the Senate position in part as a result of concerns voiced by Rep. Dornan in support of an amendment regarding confidentiality of information.¹⁹ While Rep. Dornan's amendment was rejected by the House, there was strong sentiment expressed in support of the principle that the Congress ought to be able to learn about the full range of issues and considerations bearing on a decision to grant or reject a validated license application. Hence, while Dornan's amendment was not accepted by the House, the House conferees did accept the Senate bill with respect to delegation of authority by the President to officers and employees who might be called before the Congress to testify, thereby accomplishing most of the objectives of the Dornan amendment.²⁰

REFERENCES AND NOTES, CHAPTER IV

- ¹See U.S. Congress, House Committee on Foreign Affairs, Report to Accompany H.R. 4304, Export Administration Act Amendments of 1979, Washington, D.C., U.S. Government Printing Office, 1979, pp. 2-5, listed below as House Report.
- ²See, for example, Senate Debate on Export of Hide and Skins, Congressional Record, July 21, 1979, pp. S10155-S10170, Senate Debate on Alaskan Oil Exports, Congressional Record, July 21, 1979, pp. S10175-S10192; see also House Debate on the Export of Red Cedar Logs, Congressional Record, July 23, 1979, pp. H6409-6414.
- ³See Section 10 of the Export Administration Act of 1979, Appendix 1.
- ⁴See Section 17(d) of the Export Administration Act of 1979, Appendix 1. See also, U.S. Congress, Committee of Conference, Report to Accompany Export Administration Act of 1979, S. 737, Washington, D.C., U.S. Government Printing Office, 1979, p. 54, cited as Conf. Report below.
- ⁵U.S. Congress, Senate Committee on Banking, Housing and Urban Affairs, Report to Accompany S. 737, Export Administration Act of 1979, Washington, D.C., U.S. Government Printing Office, 1979, p. 3; House Report, pp. 8, 9.
- ⁶Congressional Record, September 11, 1979, p. H7654.

⁷Ibid.

⁸Ibid., p. H7654, H7655.

⁹See, for example, colloquy and additional inserts for the Congressional Record by Senators Jackson, Thurmond, and Stevenson, Congressional Record, July 21, 1979, pp. S10125-S10145.

¹⁰Senate Committee on Banking, Housing and Urban Affairs, Report to Accompany S. 737, op cit., p. 4 (cited below as Senate Report).

¹¹House Report, pp. 2, 3. See also Senate Report, pp. 20-21.

¹²Senate Report, pp. 9, 10.

¹³House Report, p. 16.

¹⁴Ibid.

¹⁵Senate Report, p. 10.

¹⁶House Report, p. 10.

¹⁷Senate Report, pp. 3, 4.

¹⁸Senate Report, p. 18.

¹⁹Congressional Record, September 21, 1979, pp. H8301, H8302.

²⁰Conference Report, p. 52.

V. NATIONAL SECURITY EXPORT CONTROLS

While several sections of the Export Administration Act of 1979 delineate responsibilities of the Secretary of Defense with respect to export controls generally, Section 5 of the statute serves as the basis for Defense Department policy guidance and participation in the review of export license applications. This section of the statute generally follows the format first proposed by the House Foreign Affairs Committee, incorporating provisions from the House and Senate bills as they were amended on the floor of the respective bodies of the Congress.

The following chapter outlines the specific policy-relevant provisions of Section 5 and relates the history of each section as it emerged from the House and Senate committees, was refined by action on the floor of the House or Senate, and finally as it was agreed upon in conference between the House and Senate.

A. AUTHORITY

Section 5(a) of the Export Administration Act provides the basic authority for the President to exercise controls over the export of goods and technology which would make a significant contribution to the military potential of any other country or combination of countries to the detriment of United States national security, consistent with the general policy guidance of Section 3(2)(A) of the statute. Section 5(a)(1) provides that the President shall delegate authority to implement export controls to the Secretary of Commerce, who shall in turn consult with the Secretary of Defense and other appropriate departments or agencies of the U.S. Government.¹

The scope of national security export controls remains somewhat ambiguous. The most frequent reference in the hearings on extension and revision of the Export Administration Act of 1979 suggests that national security export controls are to be applied only to countries listed as ineligible for foreign assistance pursuant to Section 620(f) of the Foreign Assistance Act of 1961, as amended. These countries include Albania, Bulgaria, the PRC, the German Democratic Republic, Hungary, Latvia, Lithuania, Estonia, North Korea, Vietnam, Mongolia, Poland, Romania, Tibet, Yugoslavia, Cuba, and the Soviet Union.²

During the course of debate on the Export Administration Act, there was some discussion of the need to control exports to all countries for purposes of maintaining national security. Senator Jackson, for example, commented at length on the problem of "leakage," i.e., the acquisition of goods or technology by the Soviet Union or its allies through Western countries, some of whom are members of COCOM.³ The Department of Defense raised the issue of global export controls for maintenance of U.S. national security in connection with an amendment offered in the Foreign Affairs Committee by Rep. Bonker which was enacted into law shifting export licensing responsibility for civil aircraft equipped with inertial navigation systems.⁴ Furthermore, in the case of nuclear technology, there was explicit recognition that the threat of nuclear weapons proliferation to the security of the United States required a clear, unambiguous statement of the President's authority to assert export controls under either the Export Administration Act or the Nuclear Nonproliferation Act of 1978. Such authority is clearly provided under Section 17(c) of the statute as first proposed by Rep. Bingham with the strong support of Rep. Lagomarsino.⁵

Hence, the legislative history of Section 5(a) provides that the President may assert control over exports from the United States on a global basis to the extent that such controls are necessary to protect the national security of the United States.

It is noteworthy that as originally proposed, the language of Section 5 dealt only with military security. However, during subcommittee markup in the House International Economic Policy subcommittee, the language of Section 5 was broadened to include nonmilitary factors affecting national security.⁶

The House and Senate versions of the bill differed somewhat with respect to the distribution of responsibility for the administration of national security export controls. The Senate bill, S. 737, placed responsibility for developing and administering such controls with the Secretary of Commerce in consultation with the Secretary of Defense; the House version of the bill, H.R. 4304, placed such responsibility with the Secretary of Commerce in consultation with the Secretary of Defense and other agencies and departments thought appropriate by the Secretary of Commerce. The goal of the House bill was to ensure that national security considerations be weighed as widely as possible within the U.S. Government, consistent with the timeliness of export license application processing provisions of Section 10 of the statute.⁷

Section 5(a)(2) of the statute was enacted following an amendment offered by Rep. Glickman on the floor of the House. This section was intended to address those circumstances in which an export license has been denied on national security grounds. Rep. Glickman proposed that a license applicant be told, rather than be allowed to request, the conditions under which a license application could be modified and "...what, if any modifications in or restrictions on the goods or technology for which the license was sought would allow such export to be compatible with controls imposed under [Section 5(a)]." Said Glickman in support of his amendment:

The whole purpose is that the Department in effect already does this for big business, and all I am trying to do is to insure that all businesses have the capability to figure out how to cure any defects in their export

licenses in order to insure that we can get reasonably exported without unreasonable delay.⁸

Glickman further noted the fear that his amendment might be interpreted as requiring the Commerce Department to spend a great deal of time and effort to rewrite an export license application, and he specifically stated that such action by Commerce was not his intention.⁹

This amendment was agreed to by the House and later by the House and Senate conferees.

Section 5(a)(3) proved to be a controversial amendment first offered by Senator Jackson and then offered by Rep. Miller. The amendment to the Senate and House bills basically instructed the Executive Branch to take appropriate note of the difficulty in devising adequate safeguards against the improper use of goods or technology exported from the United States. The amendment had two rather different points of origin.

Senator Jackson had devoted several years to the study of technology transfer and the role of Western technology in the development of Soviet military capability.¹⁰ Hence, he approached the question of safeguards and end-use constraints with a belief that past history had shown them to be ineffective, especially with respect to the re-export provisions of safeguards and other end-use restrictions. As he noted during Senate debate on his amendment:

Most high technology products are subject to controls even to CoCom member nations. Of course, the danger of re-export of items subject to CoCom controls is less significant than the danger present by exports to non-CoCom member nations. It is the purpose of this amendment that risk of re-export of critical goods in these situations be carefully considered--which is not the case under the present system of cursory review of such license cases.

The most important objective of this policy on free-world controls is to close the glaring loopholes whereby exports of many critical technologies are completely unregulated.¹¹

Hence, we see from the record that Senator Jackson in proposing his amendment with respect to the question of the efficacy of safeguards was particularly concerned about the problem of "leakage."

Representative Miller, on the other hand, seemed more concerned about direct diversion of goods and technology from a stated, permitted end use to a proscribed end use. He noted in support of his amendment:

...to successfully implement the critical technologies approach endorsed by this bill it is imperative that we correct an existing weakness in the current system. One such loophole concerns the so-called end-use statements and safeguards to prevent the diversion of technology for military purposes once it has been transferred to a controlled nation like the Soviet Union...

In light of the Kama River truck plant incident, it would be totally naive for the United States to think that safeguards are an effective mechanism in preventing diversion. If the Soviets want to divert the technology for direct military purposes, they will do so, like they have done with the military truck engines coming out of the Kama River.¹²

Subsequent debate in the House made clear that the Kama River truck plant case, where the Soviet government used American-supplied technology to manufacture trucks, some of which were then turned over to the Soviet military in contravention of at least an implicit understanding if not an explicit, binding end-use statement,¹³ was foremost in the minds of those who spoke on behalf of the Miller amendment.

During the Conference Committee proceedings, the Jackson and Miller amendments were combined along with other provisions of the House and Senate bills and incorporated into statute. While Senator Jackson was primarily concerned about re-exports of critical technologies and accompanying goods, the resulting language in statute implies that the Executive Branch should view with skepticism any pledge of non-re-export by a purchaser of a good or technology of specific end use. In essence, this subsection of Section 5(a) is intended to discourage the granting of export licenses where there is any doubt whatsoever as to the intention of the purchaser of goods or technology subject to national security export controls.

B. POLICY TOWARD INDIVIDUAL COUNTRIES

Section 5(b) of the Export Administration Act basically carries forward a provision of law first enacted in 1977. This section provides that in administering national security export controls, the United States shall consider whether the country is friendly or hostile to the United States, whether it is willing or unwilling to enforce the terms and conditions of export licenses, including end-use constraints and prohibitions on the re-export of goods or technology, and other appropriate factors, in addition to whether or not the country is governed by a communist party.

The House adopted a version of Section 5(b) requiring periodic review of the policy of the United States toward individual countries; the Senate bill provided that the policy toward individual countries be reviewed every three years in the cases where exports to a country were controlled pursuant to a multilateral agreement and annually where exports to a country were controlled by the United States alone. The conferees agreed to the Senate provision.¹⁴

C. CONTROL LIST

The heart of national security export controls is a list of goods and technology over which export controls are exercised by the Secretary of Commerce. Congressional debate focused in large measure on who should make up the list of items, be they goods or technology, subject to national security export controls. Debate on Sections 5(c) and 5(d) can be difficult to interpret. Two issues are intertwined throughout the two subsections: (1) who decides what items are to be listed on the Commodity Control List for the purposes of national security export controls; and (2) what items--goods or technology--are to be controlled. The confusion is further exacerbated because the House and Senate bill differed in format. The statute that emerged from the Congress drew heavily for format on the House bill; therefore the discussion that follows reflects the perspective of the House of Representatives while acknowledging the important contributions of the Senate in the shaping of provisions of both Sections 5(c) and 5(d).

The Senate bill as reported by the Banking Committee authorized the establishment of a commodity control list for the purposes of exercising national security export controls, the list to be made up and administered by the Secretary of Commerce.¹⁵ Senator Jackson, noting that maintenance of national security is a Defense Department function, proposed that the primary responsibility for drawing up the national security export control list be given to the Secretary of Defense.¹⁶ Said Jackson:

...the implementation of the critical technologies approach endorsed by the bill will not be realized unless independent judgments are made of the national security risks of exporting America's most sophisticated technology. The Department of Defense has expertise to carry out these reforms. The Department of Commerce--which has proven itself institutionally and philosophically

incapable of developing a coherent export policy which protects national security without impairing legitimate trade--cannot be entrusted a lead role in this important undertaking.¹⁷

Senator Jackson's views were echoed by Senator Hayakawa¹⁸ and Senator Thurmond.¹⁹

Senators Stevenson and Heinz argued against the specific proposal made by Senator Jackson to shift responsibility of drawing up the national security commodity control list from the Commerce to the Defense Department.²⁰

Out of this dispute came a compromise in which the Secretary of Defense would have responsibility for identifying critical goods and technologies to be subject to national security export controls in addition to or in lieu of other goods and technology on the commodity control list promulgated by the Secretary of Commerce.²¹ This provision of the Senate bill was further modified in subsequent debate over the creation of a militarily critical technologies list to be discussed below.

The House Foreign Affairs Committee reported Section 5(c) in a form that ultimately was enacted into law. The House version of Section 5(c) provided that the Secretary of Commerce had responsibility for drawing up the commodity control list, part of which would be devoted to the identification and control of goods and technology which if exported from the United States might prove detrimental to U.S. national security. The House bill further provided that the Secretary of Defense and other appropriate agencies and departments should identify goods and technologies which should be subject to national security export controls and that, in the event that the Secretary of Commerce and the Secretary of Defense did not concur with respect to specific goods or technologies being placed on the commodity control list, the disagreement would be taken to the President for resolution.²²

When the House bill reached the floor, the issue of responsibility for drawing up the commodity control list became the subject of an intense debate, again mixing two important issues--who has responsibility for drawing up the list and what items are placed on the list. Representative Bingham and Rep. Ichord clashed on this issue at the outset of the debate²³ on the Export Administration Act, setting the stage for an unusually stimulating floor fight.

Representative Ichord offered an amendment similar to an amendment offered by Senator Jackson requiring the Secretary of Defense to identify militarily critical goods and technologies which would automatically be incorporated into the Commodity Control List.²³ The amendment offered, however, did not address the central issue of basic responsibility for drawing up the national security commodity control list, which was left in the hands of the Secretary of Commerce in consultation with the Secretary of Defense, as proposed by the House Foreign Affairs Committee.

When the House and Senate bills were considered by the Conference Committee, it was decided to resolve the difference between the two bills on the question of central responsibility for the maintenance of the commodity control list in favor of the House bill. As noted in the conference report:

The conferees intend this provision, as well as the provision agreed to with respect to the creation of a list of critical technologies, to serve to clarify the respective roles of the Secretary of Commerce and the Secretary of Defense in the list maintenance and review processes, but not to change fundamentally the current sharing of responsibilities between these two officials and their respective Departments. The conferees intend that the existing array of responsibilities for the administration of export controls within the executive branch remain unchanged and

impose no new constraints on export licensing. The Secretary of Commerce retains responsibility for maintaining the export control list; and the responsibility of the Secretary of Defense to identify critical goods and technologies for possible inclusion [emphasis added] on that list is made clear.²⁴

When the question of who was responsible for identification of goods and technologies to be placed on the commodity control list had been successfully resolved, attention then focused on the nature of the goods and technologies to be controlled. We turn now to a brief examination of the evolution of Section 5(d) of the Export Administration Act dealing with the control of militarily critical goods and technologies.

D. MILITARILY CRITICAL TECHNOLOGIES

As noted in Chapter 3, the concept of militarily critical technologies was first advanced in the 1976 Defense Science Board study chaired by J. Fred Bucy, entitled An Analysis of Export Control of U.S. Technology--A DOD Perspective. The thesis of the report is that the primary focus of U.S. export controls should be on design and manufacturing know-how, including arrays of design and manufacturing know-how, keystone manufacturing, inspection, and test equipment, and products accompanied by sophisticated operation, application or maintenance know-how. The purpose of export controls should be to inhibit the acquisition of military systems or the technology required to manufacture such systems that would reduce the qualitative superiority of U.S. and allied weapons systems.²⁵

While the Bucy report stirred much interest on Capitol Hill from the time of its release, it was not until 1978 that Members of Congress grew restive over the slow pace of DOD's implementation of its recommendations. It seems clear from many of the statements in the Congressional Record over the period 1977-1979 that two rather distinct schools of thought developed regarding the

effect of implementing the Bucy Report recommendations. One school of thought held that implementation of the critical technologies approach to export controls might result in few tangible goods being subject to export licensing requirements. A second school of thought, perhaps always suspicious of any East-West trade, expressed the view that implementation of the Bucy Report would result in significant reduction in advanced technology East-West trade. These two diverse schools of thought, represented by Rep. Bingham, Senator Stevenson, and Senator Heinz on the one hand and Senator Jackson, Reps. Miller, Wolff, and Ichord on the other, clashed with great vigor over the provisions of Section 5(d) of the Export Administration Act.

As noted above in the preceding section, several amendments were debated on both the House and Senate floors with respect to the roles of the Secretary of Defense in the identification of goods and technology for inclusion on the commodity control list. Both the House Foreign Affairs Committee and the Senate Banking Committee reported legislation endorsing the critical technologies approach to export control. The House Foreign Affairs Committee explicitly acknowledged its intellectual debt to the 1976 Defense Science Board, noting in its report:

...many of the shortcomings of the export licensing process are attributable to the scope of the controls. The controls are so broad that many more license applications are required than can be scrutinized carefully and processed efficiently. If the executive branch could be more precise about what needs to be controlled, more attention could be focused on critical items.

...Implementation of the "Bucy Report" requires the elaboration of a list of critical technologies which is both sufficiently narrow to constitute an improvement over the present system, and sufficiently precise to

be useful for guiding the decisions of individual licensing officers. The Department of Defense has been working on such a list for three years, and the Committee was hopeful that the Department would have made sufficient progress to permit the Committee to sanction the "critical technology approach" in the law. Defense Department testimony indicated that the effort is still far from complete and the results uncertain. Accordingly, the Committee did not feel prepared to mandate the implementation of the approach as the basis for export controls. Instead, the Committee officially sanctioned the study itself, directing that it go forward and that the Secretary of Defense report annually on its progress.²⁶

The Senate Banking Committee, writing in a similar vein, noted in its report accompanying S. 737:

...this legislation is needed to bring about appropriate and timely revision of the lists of goods and technology subject to export license control. The number of license applications received by the Department of Commerce is expanding rapidly, nearing an annual level of 80,000 applications per year. The increased applications reflect a failure to prune the control lists and to concentrate licensing requirements where they can be most effective. The Defense Science Board Task Force on Export of U.S. Technology recommended in a report released February 27, 1976, that export controls for national security purposes be focused upon retarding transfers of technology which could significantly enhance the military capability of potential adversaries. The Task Force report suggested that other controls, particularly on end products, could be reduced once effective controls on the transfer of militarily critical technology were in place. Three years after the Task Force report a critical technology approach has still to be devised and implemented. Failure to implement the Task Force report could

result in controls which limit some exports unnecessarily while controlling insufficiently other exports which could be seriously detrimental to national security.²⁷

* * * * *

S. 737 requires that export controls maintained for national security purposes be reviewed by the President every three years in the case of controls maintained cooperatively with other nations and every year in the case of unilaterally maintained controls, with respect to the countries to which such controls should apply. Priority in administering such controls is to be given to preventing exports of militarily critical goods and technology, and the Secretaries of Commerce and Defense are required to review and revise such controls to insure they are focused upon and limited, to the maximum extent possible consistent with the purposes of the bill, to militarily critical goods and technology and the mechanisms through which they may be effectively transferred. The Committee notes with approval the efforts toward that end underway within the Administration.²⁸

The authorizing committees in both the House and Senate were generally supportive of the critical technologies approach to export controls and urged DOD to carefully weigh implementation of the recommendations of the Defense Science Board. However, neither committee was willing to mandate the immediate substitution of the critical technologies approach for more traditional analysis of export license applications because of shared uncertainty among the Executive Branch and the committees over the applicability of the approach to specific cases.

When the legislation reached both the Senate and House floors, several Senators and Representatives were insistent that

the critical technologies approach be implemented forthwith. S. 737 provided generally for the use of the critical technologies approach in the licensing of exports subject to national security export controls, directing in Section 4(a)(2)(B), "In administering export controls for national security purposes as prescribed in Section 3(2)(C) of this Act, priority shall be given to preventing the effective transfer to countries to which exports are controlled for national security purposes of goods and technology critical to the design, development, or production of military systems which would make a significant contribution to the military potential of any nation or combination of nations which could prove detrimental to the national security of the United States."

Senator Jackson, believing that goods and technology without direct application to a military system could nevertheless transfer important and militarily useful technology, proposed an amendment broadening the scope of the highest priority national security export controls so that all critical goods and technology, as opposed to militarily critical goods and technology, might be subject to national security export controls.²⁹

Senator Stevenson countered Senator Jackson, proposing language that would encourage the application of national security export controls to include goods and technology critical to the design or manufacture of "existing or potential military systems including weapons, command, control, communications, intelligence systems, and other military capabilities such as countermeasures."³⁰ While this language was acceptable to Senator Jackson and the Senate as a whole, action in the House and subsequent agreement in conference resulted in a somewhat different definition of those goods and technologies deemed critical from a national security export control standpoint.

A point made by both Senator Jackson and Senator Stevenson was that the critical technologies approach, as critical

technology and goods were defined in the Senate bill, was feasible to implement immediately. Both Senators apparently felt that the existing commodity control list, subject to specified DOD modification by way of suggestions to Commerce, would be feasible to implement almost immediately.

The issue of responsibility for identification of critical technologies and either further study or immediate implementation of the critical technologies approach to export control was settled in a somewhat different manner by the House. The bill, H.R. 4304 as reported by the Foreign Affairs Committee, contained the following provision:

(d) Military Critical Technologies.--

(1) The Congress finds that the national interest requires that export controls under this section be focused primarily on military critical technologies, and that export controls under this section be removed insofar as possible from goods the export of which would not transfer military critical technologies to countries to which exports are controlled under this section.

(2) The Secretary of Defense shall develop a list of military critical technologies. In developing such list, primary emphasis shall be given to--

(A) arrays of design and manufacturing know-how;

(B) keystone manufacturing, inspection, and test equipment; and

(C) goods accompanied by sophisticated operation, application, or maintenance know-how,

which are not possessed by countries to which exports are controlled under this section and which, if exported, would permit a major advance in a weapons system of any such country.

(3) The list referred to in paragraph (2) shall--

(A) be sufficiently specific to guide the determination of any official exercising export licensing responsibilities under this Act; and

(B) provide for the removal of export controls under this section from goods the export of which would not transfer military critical technology to countries to which exports are controlled under this section, except for goods with intrinsic military utility;

(4) The list of military critical technologies developed by the Secretary of Defense pursuant to paragraph (2) shall become a part of the commodity control list subject to the provisions of subsection (c) of this section.

(5) The Secretary of Defense shall report annually to the Congress on actions taken to carry out this subsection.

The Foreign Affairs Committee bill endorsed the critical technologies approach. It defined those parameters of technology that make them militarily critical for purposes of export control. Such technologies or goods could not be possessed by countries to which exports are controlled on national security grounds. Furthermore, the militarily critical technologies list would be incorporated into the commodity control list at some unspecified point in time.³¹

The bill as reported by the House Foreign Affairs Committee came under attack by Rep. Ichord for its failure to mandate immediate promulgation of a militarily critical technologies list and its incorporation as part of the CCL. Furthermore, Ichord argued that the Committee on Foreign Affairs bill, in giving other agencies and departments a statutory right to contribute to the development of a militarily critical goods and technology list, failed to fully take into account the pre-eminence of the Defense Department in determining what technology was and was not related to national security.³² To remedy these shortcomings, Rep. Ichord introduced the following version of Section 5(d) of H.R. 4304 as a substitute for that proposed by the Committee on Foreign Affairs:

(d) MILITARY CRITICAL TECHNOLOGIES--

(1) The Congress finds that the national interest requires that export controls under this section be focused primarily on military critical technologies, and that export controls under this section be implemented for goods the export of which would transfer military critical technologies to countries to which exports are controlled under this section.

(2) The Secretary of Defense shall develop a list of military critical technologies. In developing such a list, primary emphasis shall be given to--

(A) arrays of design and manufacturing know-how;

(B) keystone manufacturing, inspection, and test equipment; and

(C) goods accompanied by sophisticated operation, application, or maintenance know-how, which are not possessed by countries to which exports are controlled under this section and which, if exported, would permit a significant advance in a military system of any such country.

(3)(A) The list referred to in paragraph (2) shall be sufficiently specific to guide the determinations of any official exercising export licensing responsibilities under this Act; and

(B) The initial version of this list referred to in paragraph (2) shall be completed and published in an appropriate form in the Federal Register not later than October 1, 1980.

(4) The list of military critical technologies developed by the Secretary of Defense pursuant to paragraph (2) shall become a part of the commodity control list.

(5) The Secretary of Defense shall report annually to the Congress on actions taken to carry out this subsection.³³

As noted by Rep. Bingham, the Ichord substitute for the Foreign Affairs Committee version of Section 5(d) differed in three respects:

- the substitute eliminated language intended by the Foreign Affairs Committee to emphasize critical technologies and relax or remove export controls over goods and technologies which do not make significant contributions to the military potential of other nations to the detriment of U.S. national security;
- the substitute required completion and publication of an initial version of the military critical technologies list by October 1, 1980, a date that might not be feasible for DOD to meet in view of its testimony to several Congressional committees;
- the substitute did not give other agencies or departments an opportunity to contribute their views to the establishment of militarily critical technologies.³⁴

In Bingham's view it was the last point on which he and Ichord differed most significantly.

Ichord sought to highlight the differences between his substitute and the Foreign Affairs Committee bill during the course of debate, most notably pointing out the urgency for implementation of the critical technologies approach. Ichord replied:

I would point out to the gentleman in the hearing record on H.R. 3216 that the Committee on Armed Services conducted is the testimony of Mr. Larry Brady, the Director of the Export Control Agency, who has been working on this matter with the Defense Department. Mr. Battista, a staff counsel, asked him this question:

Can you achieve it in 180 days?
Mr. Brady. I do not think so.
In what time frame do you think?
Mr. Brady. I think six months
to a year, perhaps. Six months
to a year.

I would state to the gentleman from New York that I personally called Dr. Ruth Davis. She gave me the assurance, and Dr. Ruth Davis has the overall responsibility for the establishment of this approach, that she can put it into being in 1 year; so I have no doubt about their being able to institute the approach.³⁵

Following a lengthy debate, the House accepted the Ichord substitute for Section 5(d) in lieu of that proposed by the Foreign Affairs Committee.

The results of the Conference Committee carried forward the most significant provisions of the House-passed version of the military critical technologies list requirement. The conference report deleted the statement of findings of the Congress in Section 5(d)(1) and reiterated the responsibility of the Secretary of Commerce, in consultation with the Secretary of Defense, for the formulation and review of the national security commodity control list. The Conference Committee also opted for language making clear that the Secretary of Defense bore primary but not sole responsibility for the development of the militarily critical technologies list.

The conferees accepted the wisdom of Rep. Ichord with respect to the time scale in which the initial version of the militarily critical technologies could be promulgated, as well as the desirability of adding items on the list to the CCL in accordance with the more general mechanisms by which items are to be placed on the commodity control list. The conferees also accepted the need for the militarily critical technologies list to be specific enough for use in export licensing. In addition, the requirement that the Secretary of Defense report annually with respect to his actions to implement Section 5(d) of the Export Administration Act was retained.³⁶

In sum, Section 5(d), mandating the creation of an initial version of the militarily critical technologies list, stemmed

largely from the House of Representatives debate on an amendment offered by Rep. Ichord that was in reality very close to the version of the subsection offered by the Committee on Foreign Affairs.

E. EXPORT LICENSES

Section 5(e) of the Export Administration Act of 1979 stemmed from concern by both the House Foreign Affairs Committee and the Senate Banking Committee about the delays encountered by export license applicants in obtaining licenses for products requiring validated licenses. Hearings on revision and extension of the Export Administration Act documented many delays, leading both committees to conclude that the creation of a new class of licenses and their use in controlling exports pursuant to national security export controls would be beneficial in two senses.

First, the use of the new license--the qualified general license--would accelerate the licensing process for goods and technology not deemed militarily critical but still subject to national security export controls. Secondly, the use of the qualified general license would permit licensing officers in the Commerce Department and their colleagues in the Defense Department, as well as other agencies, to focus their attention on those more significant, militarily critical goods and technologies.

The conferees resolved relatively minor differences between the House and Senate versions of the subsection by merging the two. The resulting language followed that proposed by the House with respect to the use of the qualified general license wherever possible and followed that proposed by the Senate with respect to procedures for the approval of items that can be exported with a qualified general license as well as allowing more time for establishing those procedures.³⁷

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F. FOREIGN AVAILABILITY AND NATIONAL SECURITY EXPORT CONTROLS

Section 5(f) of the Export Administration Act of 1979 sets forth the standards for implementing export controls for national security purposes when foreign availability of goods or technology as defined in Section 4(c) is alleged to exist. The language of Section 5(f) represented a compromise between the language proposed by the authorizing committees intended to permit most exports if foreign availability could be demonstrated, and language offered by Reps. Wolff, Miller, and Ichord, and Senators Jackson and Moynihan intended to maintain national security export controls even though foreign availability might be thought to exist.

The Senate Banking Committee reported S. 737 with general provisions regarding foreign availability which instructed the President to refrain from imposing export controls for either foreign policy or national security reasons where goods or technology were available without restriction from sources outside the United States in significant quantities and comparable in quality to those produced in the United States, unless the President determines that adequate evidence has been presented to him demonstrating that such controls would further U.S. foreign policy or national security objectives.³⁸

When the Senate bill reached the floor, several amendments relating to foreign availability were offered. Senator Moynihan, expressing concern about the quality of information used to establish foreign availability, offered an amendment which provided:

In assessing foreign availability, no weight may be accorded representations as to foreign availability by an applicant for an export license, unless sworn to in writing by the chief executive officer of the applicant. Such sworn representations without adequate independent corroboration shall not constitute reliable evidence.³⁹

Senator Stevenson, noting the legal implications of a sworn statement by a corporate officer and the potential for complicated judicial proceedings arising from such statements which might further restrain U.S. exports, suggested an amendment to that proposed by Senator Moynihan which would impose a more rigorous standard of proof of foreign availability without requiring sworn statements.⁴⁰ Senator Moynihan found this standard of proof acceptable.

Senators Stevenson and Heinz then proposed an amendment to their own Banking Committee bill which would instruct the President to initiate international negotiations to eliminate foreign availability of goods and technology for which the United States found it necessary to continue to impose national security export controls, despite a finding of foreign availability. In essence, the President was instructed to eliminate the condition, "available without restriction," through negotiations if national security export controls were to be retained on products or technology otherwise available from foreign sources.⁴¹

Another issue addressed on the floor of the Senate was the availability to the Department of Commerce of information bearing on foreign availability held by various U.S. Government agencies. There was a perception well articulated by Senator Jackson that the Commerce Department was not taking full advantage of or was not being provided with information held by the various departments and agencies concerned with foreign military capability that would bear on determinations of foreign availability. Senator Jackson proposed the following language:

Each department or agency of the United States with responsibilities with respect to export controls, including intelligence agencies, consistent with the protection of intelligence sources and methods, shall furnish information concerning foreign availability of such goods and technologies

to the Office of Export Administration and such Office when requested or where appropriate shall furnish the information it gathers and receives to such departments and agencies.⁴²

Senator Jackson expounded on the intent of his amendment, fairly summarizing the concern of many Senators:

...this amendment is intended to make it clear that the various departments and agencies involved in the export control process have an obligation to furnish foreign availability information to the Office of Export Administration and that OEA, in turn, is obligated to make it available to those departments and agencies. OEA's role should be viewed primarily as one of coordination of the existing efforts by departments and agencies to avoid duplication and to assure that information is shared.⁴³

Having addressed some of the questions about data affecting judgments with respect to foreign availability, the Senate then turned its attention to dealing with the sale of goods or technology subject to national security export controls when foreign availability was found to exist.

The bill reported by the Senate Banking Committee required the President to grant export licenses if foreign availability were found to exist for goods or technology, unless the President determined he had adequate information justifying continued application of export controls.⁴⁴ Senator Moynihan proposed an amendment intended to strengthen the negotiating position of the United States vis-à-vis its COCOM partners by explicitly authorizing the imposition of trade sanctions against COCOM partners who did not cooperate fully with the United States in the restriction or regulation of international commerce in militarily critical technologies or goods.⁴⁵

Senators Stevenson and Heinz, noting that the Moynihan amendment was a rather blunt and somewhat impractical instrument of foreign policy for dealing with our allies, offered a substitute instructing the President to undertake negotiations with friends and allies in order to eliminate foreign availability in militarily critical goods or technologies.⁴⁶ The Stevenson/Heinz substitute provided specifically for the following:

Whenever the President has reason to believe goods or technology subject to export control for national security purposes by the United States may become available to controlled countries from other countries, the President shall promptly initiate negotiation with the governments of such countries to prevent such foreign availability. In any instance in which such negotiations fail to prevent or secure the removal of such foreign availability and the President requires additional authority to take effective action toward that end, the President shall report fully to the Congress and where appropriate recommend measures to secure the removal of such availability.⁴⁷

Stevenson argued that his amendment retained the same general authority of the Moynihan amendment but did not immediately raise the specter of trade sanctions against a friendly nation or ally because of differing views over the sensitivity of a particular good or technology being sold to the Soviet Union, its Warsaw Treaty Organization allies, or the PRC.⁴⁸

The Senate, we see, raised many issues and offered at least partial solutions with respect to the interpretation of the meaning of foreign availability within the context of national security export controls. These issues were also debated by the House.

As noted in the report of the Foreign Affairs Committee:

With the increasing ability of other high technology producers to compete with

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the United States in the world market, the ability of the United States unilaterally to deny goods and technology to the communist countries is increasingly being eroded. H.R. 4304 seeks to take account of this reality and to strengthen the presumption of the Act against unilateral controls.⁴⁹

The House Committee presented the House a bill intended to accomplish three purposes:

- require the Secretary of Commerce to continually monitor foreign availability of goods and technologies requiring a validated export license;
- require the Secretary of Commerce to verify foreign availability;
- require the President to attempt through negotiations to achieve agreement within COCOM on the scope of national security export controls.⁵⁰

When the House bill reached the floor of the House for debate, several amendments were offered with respect to foreign availability and were accepted by the bill's sponsors. Representative Lester Wolff, who had made several suggestions incorporated into the bill when the Committee on Foreign Affairs considered the legislation, offered an amendment with respect to the provisions governing the negotiation of international agreements to eliminate foreign availability which was accepted by Reps. Bingham and Lagomarsino on behalf of the bill's sponsors. The Wolff amendment made clear that immediately upon a Presidential determination that foreign availability existed for a militarily critical technology or good, the Secretary of State should undertake negotiations to eliminate such availability.⁵¹

A second amendment offered by Rep. Wolff introduced the standard of proof of foreign availability used in the Senate bill as amended by Senators Moynihan, Stevenson, Jackson, and Heinz,

and provided that judgments with respect to foreign availability be based on "reliable evidence including scientific or physical examination, expert opinion based upon adequate factual opinion, or intelligence information."⁵²

Representative Wolff also offered on the floor of the House language proposed by Senator Jackson with respect to the sharing of intelligence information among the Department of Commerce and other agencies or departments first proposed on the Senate side by Senator Jackson.⁵³ This amendment was also accepted by Rep. Bingham, with a clear understanding based on a colloquy between Bingham and Rep. Ichord that the Commerce Department was to be an agency of intelligence analysis and assessment, not an agency for intelligence collection.⁵⁴

The Conference on the Export Administration Act resolved the minor differences between Section 5(f) by opting for Senate language with respect to the international negotiations to be undertaken to eliminate foreign availability and generally agreeing to the position of the House on other subsections of Section 5(f), the language of which drew heavily from the Senate measure in the first instance.⁵⁵

It is noteworthy that there was little debate on the floor of either the House or Senate on the meaning of the terms, "available without restriction," or "available in significant quantity," or "comparable quality." These terms were debated in 1977, but their meaning has not grown clearer with the passage of time.⁵⁶

G. INDEXING

One of the more controversial provisions of Section 5 of the Export Administration Act of 1979 is Section 5(g) which requires indexing of the specifications used to establish national security controls over the exports of goods and technology. The basic premise of Section 5(g) is that as the performance capability of goods or technology improves over time,

controls on less capable goods and technology should be relaxed or foregone completely as the newer, more capable goods or technology reach the international market. In order to facilitate such relaxation of controls, Section 5(g) provides that the Secretary of Commerce shall develop procedures which permit annual review of the performance specifications or parameters used to identify controlled goods or technologies.⁵⁷

Section 5(g) also includes a provision urging the Secretary of Commerce to remove site visitation requirements where appropriate from various safeguards requirements imposed in the terms and conditions of export licenses on certain goods or technologies to certain destinations. This provision was proposed by Senator Stevenson and was motivated by his desire to reduce the burden of government regulation on smaller exporters who cannot afford to open branch offices in foreign countries solely for the purpose of monitoring compliance with the terms of export licenses. This provision was adopted by the Senate Banking Committee and was adopted by the Senate with no further discussion.⁵⁸

Both elements of Section 5(g) were proposed by the House and Senate authorizing committees in response to complaints by industry representatives who appeared before the committees during both 1978 and 1979 to discuss specific proposed exports as well as the more general problems of conducting international commerce under terms and conditions imposed by the Export Administration Act.⁵⁹ The action proposed by the authorizing committees was intended to alleviate some of the concerns about the inhibitions on the development of overseas markets for American goods, services, and technology without substantially reducing control on those goods or technologies which might have significant military applications.⁶⁰

During Senate debate on the provisions of Section 5(g), Senator Jackson proposed an amendment to delete the indexing provisions of the section in its entirety, arguing:

The thrust of the provision--which this amendment would delete--is to substitute factual investigation and technical analysis with a simple-minded litmus paper test. To suggest by law that the relative rates of obsolescence of United States and Soviet technology is predictable and measurable is dangerous folly.⁶¹

Senator Jackson proposed an amendment which substituted a requirement that the Secretary of Commerce reduce delays in implementing decisions to relax or remove national security controls which was accepted by the Senate.

However, during debate on the provision in the House, the position of the authorizing committees was sustained despite efforts by Rep. Ichord to amend the House bill on the floor. Noted Ichord during the debate:

...this indexing concept envisions the establishment of thresholds below which goods or technology would no longer be subject to controls...

Mr. Chairman, I submit this concept is flawed in two respects. First, it is an attempt to forecast technology in advance and predetermine the state of the art at a given time. I submit this is a very dangerous way to establish our export controls.

One cannot tell whether a particular technology, today, is going to be obsolete on January 1, 1980, or January 1, 1981. We already have the authority on page 10 [of the House bill] to review the items on the control list. I think it particularly dangerous to proceed with such a vague, ambiguous control concept.⁶²

Representative Couter noted further, in opposition to the indexing provision:

I think in order to protect, in order to give substance to the balance of the particular bill, particularly to the Ichord amendment, we have to make sure that we are not giving or not selling technology which may not be the latest here, but nevertheless, which may be two or three generations ahead of foreign technology, Soviet technology if you will.⁶³

These considerations, while important and valid, were nevertheless misdirected, as noted by Rep. Bingham. The provision, Bingham pointed out, affected procedures for review of performance specifications, not the specifications themselves, and technology that was beyond the capability of the Soviets to produce themselves would remain controlled, even if it were not state of the art in the United States or in Western Europe.⁶⁴

This point was underscored by Rep. Conte, who noted:

First, let me emphasize that the bill language does not mandate indexing of certain goods after the performance levels of such goods have risen; it permits this indexing. The Secretary of Commerce, whom we assume will be working in close coordination with the Secretary of Defense and Secretary of State is allowed to periodically reevaluate requirements for validated and qualified general licenses for high technology goods.

As Members of the House know, the concept of indexing high technology items has been agreed to by COCOM.... COCOM already provides for periodic review of performance parameters of goods. The indexing provision in this bill merely provides for a more orderly, comprehensive reassessment of overall product technology. If the United States, due to slow reevaluation of national security requirements, fails to allow the exports of high technology goods which in no way jeopardize our security, then we are hurting our balance of trade and our competitive edge in a market area that is very important to our economy today and looks as though it will

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become more and more crucial in the years to come.⁶⁵

The House sustained the position of the Committee on Foreign Affairs requiring the Secretary of Commerce to develop procedures which would permit indexing where appropriate as often as annually. This position was agreed to in conference with the Senate and enacted into law.

In addressing the operational implications of the indexing provisions of Section 5(g), the conferees set forth their intent:

The indexing provision is not intended to authorize the automatic decontrol of goods and technologies in accordance with prior projections of obsolescence. The committee on conference expects that, prior to effectuating any scheduled removal or relaxation of a control, a current appraisal will be made to assure that prior objections have actually materialize. [sic] The committee of conference also wishes to make it clear that the indexing provision is in no way to be interpreted to authorize decontrol of items which are obsolete by U.S. standards, but would nevertheless make a significant contribution to the military potential of the Soviet Union or other adversary nation.⁶⁶

The Conference Committee sought with this language to make its intent clear, emphasizing the procedural authorities of the Secretary of Commerce to establish indexing procedures but providing direction that such procedures not result in automatic decontrol. Rather, the conferees desired that decontrol occur on the basis of sound technical assessments of actual, not projected capabilities and states of art of various technologies.

H. TECHNICAL ADVISORY COMMITTEES

Section 5(h) of the Export Administration Act of 1979 expands the authorities of the Secretary of Commerce as well as other

departments to utilize the services of technical advisory committees appointed by the Secretary of Commerce for the purpose of obtaining private sector views and advice on the administration of export controls. The Senate bill basically carried forward earlier provisions of law. The House bill, at the suggestion of Rep. Wolff before the Foreign Affairs Committee, authorized access to technical advisory committees explicitly by the Defense Department and other departments and agencies engaged in the export control process on the theory that they, too, should benefit from direct private sector input into their administrative activities and proceedings.⁶⁷ The technical advisory committees are further charged with being the first filter through which claims or assertions of foreign availability must pass.⁶⁸ The conferees basically opted to combine the two somewhat different versions of the section dealing with technical advisory committees adopted by the Senate and House respectively without substantially altering the scope of responsibilities given such committees.⁶⁹

I. MULTILATERAL EXPORT CONTROLS

Section 5(i) of the Export Administration Act serves as the specific statutory basis for United States participation in the informal Coordinating Committee known as COCOM, consisting of the NATO countries (less Iceland) and Japan. Section 5(i) replaced the Mutual Defense Assistance Control Act of 1951--the "Battle Act"--as the statutory basis of such participation.

The objective of language proposed in both the House and Senate with respect to multilateral export controls was the same--promote better and more effective control over the sale of goods and technologies to the Soviet Union and its allies that might make a significant contribution to the military potential of those nations--the principal adversaries posing a national security threat to all NATO members. As noted in the House Foreign Affairs Committee Report:

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The committee feels that the main problem with COCOM is that the United States has sought to impose broader controls on COCOM than the other members have been willing to accept and enforce, and has then disregarded evasions of the controls by the other members out of fear that attempts to enforce the controls would undermine the COCOM system.⁷⁰

One aspect of multilateral export controls of great concern to some members of Congress and to the Executive Branch as well was the subject of re-export controls. While the House Foreign Affairs Committee thought such controls might be ill advised, a majority of both the House and Senate continued to believe that such controls were warranted. Hence, both the House and Senate agreed to retain the current authority to impose re-export controls over U.S.-origin goods and technology from COCOM countries to third countries.⁷¹

Section 5(i) requires the President to participate in COCOM activities "with a view toward reaching agreement on publishing the COCOM list and procedures, holding periodic, high level meetings of COCOM-member governments, reducing the scope of the COCOM controls, and establishing more effective enforcement procedures."⁷² The House Foreign Affairs Committee further expressed the view that the United States "should offer a reduction in the scope of the controls in exchange for more effective enforcement procedures."⁷³

J. MONITORING OF COMMERCIAL AGREEMENTS WITH CERTAIN COUNTRIES

Section 5(j) of the Export Administration Act was proposed by the Administration as a result of studies it undertook pursuant to the Export Administration Act Amendments of 1977 with respect to the transfer of technical data.⁷⁴ As noted by the House Foreign Affairs Committee:

The committee believes that such reporting [on commercial scientific and

technical agreements] is necessary to enable the Secretary to monitor technology transfers through such agreements. Reporting, for example, would alert the Commerce Department to possible technology transfers which might take place in the future under an agreement, and would enable the Department to make clear to the U.S. firm involved that a license would be required for the transfer to take place.⁷⁵

The provision was not controversial and was not commented upon further during Congressional debate.

K. NEGOTIATIONS WITH OTHER COUNTRIES

Section 5(k) of the Export Administration Act vests responsibility for international negotiations for the purposes of negotiating multilateral export controls with the Department of State. This provision was requested by the Administration and was intended to replace similar authorities found in the 1951 "Battle Act."⁷⁶

L. DIVERSION TO MILITARY USE OF CONTROLLED GOODS OR TECHNOLOGY

Section 5(l) provides for the automatic termination of exports and the undertaking of additional necessary steps to halt the use of goods or technology exported pursuant to a license granted should such goods or technology be used in the manufacture of items on the U.S. Munitions List contrary to the terms or conditions of the export license. This amendment offered in the House by Rep. Clarence Miller grew out of the continuing debate triggered by revelations of the Soviet Union's use of facilities at Kama River to build trucks for the Soviet Army.⁷⁷

Section 5(l) was meant to be a companion piece of legislation accompanying Section 5(a)(3), discussed above. Representative Miller noted during debate on the amendment:

All we are saying with this amendment is that if by chance the "safeguards" and

"end-use" statements fail; if by chance we made a mistake by transferring the technology--and that it can be shown that the Soviets are using the exports for military purposes--then we must stop the further flow of goods and services which will contribute or support the diversion.⁷⁸

Representative Bingham agreed to accept the amendment, noting that the amendment might require further clarification at some later point in time.⁷⁹

In fact, the conferees made one change which, it was argued, significantly narrowed the scope of the amendment. As originally proposed, Section 5(1)(2) defined diversion to significant military use to "include but ... not (be) limited to, the use of the goods or technology in the design or production of any item on the U.S. Munitions List."⁸⁰

The conferees deleted the phrase, "include but not limited to," thereby in the view of Rep. Ichord failing to define as a diversion the use of an item for the design and manufacture of an item on the COCOM commodity control list, the COCOM nuclear list, or the U.S. nuclear list.⁸¹ On the basis of a colloquy between Rep. Bingham and Rep. Ichord, it was made clear that the key feature of the Conference Report is the requirement for automatic suspension of exporting authority should a diversion of a dual-purpose item, be it a good or a technology, for the purpose of designing or manufacturing a military item be detected. On the basis of that colloquy, Rep. Ichord cast his vote for final passage of the Conference Report. While Rep. Miller persisted in arguing that the conferees had distorted the intent of his amendment beyond recognition and urged his colleagues to reject the Conference Report, in the end, his protests went unheeded and on September 28, 1979, the House completed the legislative process, enacting the Conference Report by a vote of 321 to 19.

M. SUMMARY CONSIDERATIONS

The requirements of Section 5 of the Export Administration Act of 1979 are quite elaborate. They reflect a keen Congressional eye toward both the benefits of national security export controls as well as the risks of such controls for the overall health of the U.S. economy. Even the staunchest supporters of export controls publicly defended their position by emphasizing that they seek only better national security, not unreasonable limitations on the ability of the American private sector to compete abroad.

The enactment of the requirement that the Department of Defense prepare a list of militarily critical technologies arose because such a requirement could be interpreted two ways. Some members of Congress and their staffs interpreted the MCTL requirement as leading to a narrowing of the goods and technologies subject to export control, if not immediately, then perhaps in the coming years as technology and goods were indexed and as our COCOM partners moved toward the American "critical technologies approach" to export control. Others in Congress believed that the MCTL would simply enable the Commerce Department to better understand the implications of exports to Eastern Europe and the PRC, leading the Department to do a more rigorous license application review, perhaps resulting in an increase in the number of license applications rejected.

Let us turn now to a brief consideration of the different ways in which the initial version of the MCTL may be used by various constituencies who have a stake in the outcome of the efforts to construct such a list.

REFERENCES AND NOTES, CHAPTER V

- ¹See Export Administration Act of 1979, Appendix 1.
- ²U.S. Congress, House Committee on Foreign Affairs and Senate Committee on Foreign Relations, Legislation on Foreign Relations Through 1979, Volume I, Washington, D.C., U.S. Government Printing Office, 1980, p. 109.
- ³See, for example, comments by Senator Jackson during debate on the Export Administration Act of 1979, Congressional Record, July 21, 1979, p. S10199.
- ⁴U.S. Congress, House Committee on Foreign Affairs, Extension and Revision of the Export Administration Act of 1969, Part 2, Washington, D.C., U.S. Government Printing Office, 1979, pp. 210-211; see also Congressional Record, September 21, 1979, p. H8101.
- ⁵U.S. Congress, House Committee on Foreign Affairs, Ibid., p. 209.
- ⁶U.S. Congress, House Committee on Foreign Affairs, Extension and Revision of the Export Administration Act of 1969, Part 1, Washington, D.C., U.S. Government Printing Office, 1979, pp. 766, 767.
- ⁷U.S. Congress, House Committee on Foreign Affairs, Report to Accompany H.R. 4304, Export Administration Act Amendments of 1979, Washington, D.C., U.S. Government Printing Office, 1979, pp. 6, 7 (cited as House Report below).

⁸Congressional Record, September 11, 1979, p. H7672.

⁹Ibid.

¹⁰See, for example, U.S. Congress, Senate Committee on Governmental Affairs, Transfer of Technology to the Soviet Union and Eastern Europe, Parts 1 and 2, Washington, D.C., U.S. Government Printing Office, 1977, and Transfer of Technology and the Dresser Industries Export Licensing Actions, Washington, D.C., U.S. Government Printing Office, 1978.

¹¹Congressional Record, July 21, 1979, p. S10200.

¹²Congressional Record, September 11, 1979, p. H7677.

¹³Congressional Record, September 11, 1979, p. H7678. See also U.S. Congress, Senate Committee on Banking, Housing and Urban Affairs, Trade and Technology, Part II: East-West Trade and Technology Transfer, Washington, D.C., U.S. Government Printing Office, 1979.

¹⁴U.S. Congress, Conference Committee, Report to Accompany S. 737, Export Administration Act of 1979, Washington, D.C., U.S. Government Printing Office, 1979, p. 44 (cited below as Conference Report).

¹⁵U.S. Congress, Senate Committee on Banking, Housing and Urban Affairs, Report to Accompany S. 737, Export Administration Act of 1979, Washington, D.C., U.S. Government Printing Office, 1979, p. 22 (cited below as Senate Report).

¹⁶Congressional Record, July 21, 1979, p. S10125.

¹⁷Ibid., p. S10128.

- ¹⁸Ibid., p. S10129.
- ¹⁹Ibid., p. S10130.
- ²⁰Ibid., p. S10143-S10144; S10146.
- ²¹Ibid., p. S10146.
- ²²House Report, p. 38.
- ²³Congressional Record, September 11, 1979, pp. H7653-H7655.
- ²⁴Conference Report, p. 48.
- ²⁵Defense Science Board, An Analysis of Export Control of U.S. Technology--A DOD Perspective, Washington, D.C., U.S. Department of Defense, 1976, pp. xiii, xiv.
- ²⁶House Report, pp. 8, 9.
- ²⁷Senate Report, p. 3.
- ²⁸Ibid., p. 5.
- ²⁹Congressional Record, July 21, 1979, p. S10147.
- ³⁰Congressional Record, Ibid, p. S10150.
- ³¹House Report, p. 39.
- ³²Congressional Record, September 11, 1979, pp. H7665-7671.
- ³³Ibid., pp. H7665, H7666.

³⁴Ibid., p. H7667.

³⁵Ibid.

³⁶Conference Report, p. 7.

³⁷Ibid., p. 49.

³⁸Senate Report, p. 8.

³⁹Congressional Record, July 21, 1979, p. S10152.

⁴⁰Ibid., p. S10153.

⁴¹Ibid., p. S10154.

⁴²Ibid., p. S10172.

⁴³Ibid., p. S10173.

⁴⁴Senate Report, p. 8.

⁴⁵Congressional Record, July 21, 1979, p. S10151.

⁴⁶Congressional Record, July 21, 1979, p. S10154.

⁴⁷Ibid.

⁴⁸Ibid., pp. S10154, S10155.

⁴⁹House Report, pp. 9, 10.

⁵⁰Ibid., p. 10.

⁵¹Congressional Record, September 11, 1979, p. H7661.

⁵²Ibid., p. H7662.

⁵³Ibid., p. H7663.

⁵⁴Ibid.

⁵⁵Conference Report, p. 47.

⁵⁶U.S. Congress, Office of Technology Assessment, Technology and East-West Trade, Washington, D.C., U.S. Government Printing Office, 1979, pp. 120, 121.

⁵⁷U.S. Congress, Senate Committee on Banking, Housing and Urban Affairs, U.S. Export Control Policy and Extension of the Export Administration Act, Washington, D.C., U.S. Government Printing Office, 1979, passim; U.S. Congress, House Committee on Foreign Affairs, Export Administration Act: Agenda for Reform, Washington, D.C., U.S. Government Printing Office, 1978; Extension and Revision of the Export Administration Act of 1969, Washington, D.C., U.S. Government Printing Office, 1979.

⁵⁸Senate Report, p. 4; Conference Report, p. 52.

⁵⁹U.S. Congress, House Committee on International Relations, Export Licensing of Advanced Technology: A Review, Washington, D.C., U.S. Government Printing Office, 1976; Computer Exports to the Soviet Union, Washington, D.C., U.S. Government Printing Office, 1977.

⁶⁰House Report, p. 18; U.S. Congress, House Committee on Foreign Affairs, Extension and Revision of the Export Administration

Act of 1969, op cit., Part 1, pp. 761, 762; see also pp. 943, 526, 527; 692.

⁶¹Congressional Record, July 21, 1979, p. S10194.

⁶²Congressional Record, September 11, p. H7673.

⁶³Ibid., p. H7674.

⁶⁴Ibid.

⁶⁵Ibid., p. H7676.

⁶⁶Conference Report, p. 52-53.

⁶⁷House Report, p. 18.

⁶⁸Ibid., See also Senate Report, p. 26.

⁶⁹Conference Report, p. 56.

⁷⁰House Report, p. 19.

⁷¹Congressional Record, September 11, 1979, p. H7664; see also Senate Report, pp. 11, 12.

⁷²See the appendix.

⁷³House Report, p. 19.

⁷⁴House Report, p. 14.

⁷⁵Ibid.

⁷⁶House Report, p. 19; Senate Report, p. 25.

⁷⁷Congressional Record, July 21, 1979, pp. S10125-S1045.

⁷⁸Congressional Record, September 21, 1979, p. H8313.

⁷⁹Ibid., p. H8314.

⁸⁰Ibid., p. H8313.

⁸¹Conference Report, p. 12.

⁸²Congressional Record, September 18, 1979, p. H8716.

VI. USES OF THE MILITARILY CRITICAL TECHNOLOGIES LIST

It is not surprising in view of the complex history of the Militarily Critical Technologies List that there are several possible uses of the MCTL which were not envisioned by the Congress. This section of the report engages in some speculation with regard to the possible applications of the MCTL by various users. Such uses may bear on the form and content of the initial and subsequent versions of the MCTL.

A. CONGRESSIONAL USES OF THE MCTL

The critical technologies approach won support of many members of Congress with widely divergent views on the question of East-West trade. It should therefore not be surprising to see members of Congress and their staffs look to the MCTL for guidance regarding the advisability of specific proposed exports and reach different conclusions about the utility of the MCTL. It is likely that advocates of economic warfare with the Soviet Union and its allies will review the MCTL and future U.S. exports and argue that specific transactions should be prohibited or specific products or technologies be embargoed simply because the product or technology is on the MCTL. This position overstates the immediate utility of the initial MCTL which is not now intended to be a control or embargo list, but which will in time evolve into one.¹ On the other hand the mere existence of even the critical list invites review of future export license applications by those members of Congress and their staffs who have long felt the U.S. was too permissive with respect to the sale of technology to second guess the Commerce and Defense Departments. Some of the second guessing may also be applied retroactively to other controversial cases.

The MCTL may also be used by advocates of fair trade to review prospective exports. Advocates of trade may use the list to argue about the appropriate levels of licensing and controls, insisting that a product or technology on the list be subjected to a qualified general license rather than a validated license. Again, retrospective applications of the list to past cases, particularly where such cases were very important to key members of Congress or important constituencies, are likely to arise.

Hence, the first publication of the MCTL may stimulate a series of inquiries from Congress intended to seek verification or justification of earlier export licensing advice from DOD to Commerce or decisions by Commerce. The initial MCTL may also prompt discussion on pending license applications.

The MCTL may also serve as an attractive tool for Congressional examination of other export control lists, e.g., the COCOM Commodity Control List (CCL), the Nuclear Export Control List and the U.S. Munitions List. In light of the requirements of Section 108 of the International Security and Development Cooperation Act of 1980, P.L. 96-533, mandating a Presidential review of the U.S. Munitions List, prudence suggests that DOD begin reviewing those lists now so that it can respond to Congressional inquiries about the application of the critical technologies approach to these export control lists.

B. GENERAL EXECUTIVE BRANCH USE OF THE MCTL

A related use of the MCTL will be to coordinate U.S. reviews of the COCOM CCL, COCOM Munitions List, and the U.S. Munitions List. While these lists are now under virtually constant review within the Executive Branch, recent decisions and policy studies with respect to East-West trade in light of the Afghanistan invasion by the Soviet Union³ as well as perceived burgeoning trade opportunities with the PRC will create a continuing need to examine the COCOM lists for the purpose of identifying embargoed versus controlled goods and technologies. It would

be beneficial for the United States Government to sort out these products and technologies first for its own education and second for the edification of our COCOM partners, many of whom do not apparently understand the threat to Western military or economic security posed by some aspects of East-West trade in the same terms as do we. While the initial MCTL will help focus internal U.S. Government discussions, subsequent iterations will be necessary to support COCOM deliberations.

C. EXPORT LICENSING USES OF THE MCTL

It is also likely that the initial MCTL and its supporting documentation will be used for export licensing case processing in at least three distinct ways. Commerce will use the MCTL to help sort license applications into at least two categories: those applications that can be processed internally without external agency review, and those applications requiring inter-agency consultations. ACDA will use the MCTL to help it focus on those dual-purpose technologies which might have arms control implications and hence require ACDA to review export license applications. DOD will use the list to similarly identify the license applications it should review, as well as to organize its own internal review processes.

The MCTL will also be helpful to Commerce and other agencies in reviewing and indexing the performance characteristics of products pursuant to the requirements of Section 5(g). Rapidly evolving militarily critical technologies will probably need more frequent and more detailed reviews than other more mature technologies on the MCTL.

D. INTELLIGENCE COMMUNITY USE OF THE MCTL

The intelligence community may find the MCTL particularly helpful in planning, organizing and allocating its scarce resources for purposes of fulfilling its responsibilities relating to export controls, especially supporting analyses relating to

the determination of foreign availability. While the costs of such studies, analyses and collections of data have yet to be estimated, the MCTL can be a useful tool in tasking the intelligence community. It can also be helpful in establishing priorities among and within specific collection or analysis tasks.

E. INDUSTRY USE OF THE MCTL

Industry will be expected to look at the MCTL as yet another export control list, notwithstanding any DOD disclaimers to the contrary. It is therefore incumbent on DOD to make available on a voluntary basis as much information with respect to the rationales supporting list entries as is possible, consistent with the need to protect intelligence sources and the methods. The MCTL will also be used as a "lightning rod" attracting much criticism of DOD for being too broad and too vague. As the MCTL is further refined, elaborated, and incorporated into the CCL, industry may find the MCTL a useful tool in helping it assess export potential for goods, services, and technology. Ultimately, industry may use the list as a set of parameters against which to design exports if the list is perceived as an embargo list.

F. FOREIGN USE OF THE MCTL

Finally, foreign governments and commercial concerns may use the U.S. MCTL as both a vehicle for export control and as a vehicle for focusing their own technology acquisition efforts. The U.S. MCTL may become a significant source of intelligence about the future of the U.S. economy and U.S. weapon systems to the extent that the delineation of militarily critical technologies fills certain holes in the analysis of U.S. commercial competitors or foreign governments. It will therefore be vital to successful implementation of the Export Administration Act to have Allied concurrence and support for the critical

technologies approach, notwithstanding obvious objections from certain industries or sectors of industry.

It is possible to engage in additional speculation about possible uses of the MCTL by different "consumers;" however, our purposes of exploring the utility of the MCTL seem best served by highlighting one final application. Sections 6 and 7 of the Export Administration Act of 1979 mandate both foreign policy and domestic short supply control lists, respectively. Section 17(c) authorizes the Commerce Department to license commercial aircraft for export formerly licensed by the State Department's Office of Munitions Control. While it is possible that other lists will be prepared pursuant to these sections, it is equally likely, if not highly probable, that the starting point for such lists, or the application of export controls pursuant to those sections, will be based on the MCTL. Close cooperation with State, ACDA, Commerce, and National Aeronautics and Space Administration (NASA) is therefore especially important so that export control opportunities for important, albeit not militarily critical technologies, are not foregone. This is especially true in such technology areas as advanced commercial aircraft, or to such destinations as Libya, Iraq, or South Korea where the U.S. has clear foreign policy goals and objectives which can in fact be significantly advanced by export controls on dual-purpose products or technologies. The initial version of the MCTL may be most useful in highlighting the technologies or products which are not militarily critical in the East-West context but are important and, further, are militarily critical to the development of indigenous production of arms which the U.S. would not sell under current policy to certain countries. This application of the initial MCTL was not specifically intended and its structure and format may not be appropriate for this application.

The possible uses of the initial version of the MCTL lead us directly to a few comments about future directions of the DOD effort.

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REFERENCES AND NOTES, CHAPTER VI

¹"Preamble" to the Draft DOD Militarily Critical Technologies List (U), Washington, D.C., U.S. Department of Defense, 1980, pp. 2, 3 (CONFIDENTIAL REPORT).

²See, for example, Senate debate on the amendment offered by Senators Church, Javits, and Jackson as a substitute for an amendment offered by Senator Helms to the Arms Export Control Act. The Church, Javits, Jackson amendment if enacted into law will require a review of the U.S. Munitions List. Congressional Record, June 19, 1980, p. S7206. See Congressional Record, May 28, 1980, p. H4238 for text of the Lloyd Amendment to the Arms Export Control Act which relieves the Office of Munitions Control from export licensing responsibilities for military vehicles, propeller driven aircraft, helicopters, electronic devices, and technical data related thereto if such items have direct civilian applications. See also Section 108 of the International Security and Development Cooperation Act of 1980, P.L. 96-533.

³See, for example, Jack Brougher, U.S.-U.S.S.R. Trade After Afghanistan," Business American, April 7, 1980, pp. 3-14. See also U.S. Congress, Committee on Foreign Affairs and the Commission on Security and Cooperation in Europe, The Helsinki Forum and East-West Scientific Exchange, Washington, D.C., U.S. Government Printing Office, 1980.

VII. FURTHER MCTL ISSUES FOR DOD CONSIDERATION

Despite the level of effort and resources expended by DOD to develop the initial version of the MCTL, several important questions remain unaddressed or unresolved. If the critical technologies approach to export control is to be successfully implemented, these open questions will have to be addressed. The following discussion raises issues for further consideration by DOD.

A. SCOPE OF EXPORT CONTROLS

The Export Administration Act of 1979 authorizes the President to control exports from the United States to any destination if in so doing he can prevent the acquisition of military capability by any country or combination of countries that would prove detrimental to United States national security. The initial MCTL deals almost exclusively with exports of militarily critical goods and technologies to a subset of all potential U.S. adversaries, i.e., the controlled countries specified in Section 620(f) of the Foreign Assistance Act of 1961 as amended. While it is appropriate and understandable that the initial MCTL should be so focused, it is equally important that additional judgments be made about the military criticality of goods or technology sold to (a) our allies and (b) other nations. As noted above in the discussion of diversion in Section 51, a significant number of members of Congress remain concerned about the loss of technology to our adversaries through indirect transfers through third countries.

DOD may therefore find it highly desirable to review the initial MCTL not only from the view of controlling or potentially

controlling direct transfers of MCTL items to the Soviet Union, Eastern Europe, and other countries to whom exports are presently controlled on national security grounds, but also to review the MCTL to make recommendations about the sale or transfer of technology to allies or other countries which seem especially unwilling or unable to enforce the retransfer provisions of licenses granted by the Commerce Department.

Further, DOD may wish to seek guidance from policymakers with respect to those technologies deemed militarily critical to a capability the U.S. Government would hope to inhibit from developing in other countries. It may be, for example, that transfers of space launch vehicle technology on the MCTL should be restricted or controlled to all destinations because of its inherently destabilizing potential for the international system and the need to protect U.S. national security or national interests from direct or indirect threats posed by nations who might acquire such capability. In this specific example the indirect threat to the security of the United States arising from an accelerated arms race or regional conflict into which we may be pulled would be both necessary and sufficient grounds to assert national security export controls over such technology.

B. FOREIGN AVAILABILITY

A second issue which DOD may wish to address in the future is the question of foreign availability. While the law sets forth both a definition and a standard of proof for foreign availability, neither may be sufficiently clear for the purposes of administering export controls to the satisfaction of DOD. The phrase, for example, "available without restriction" fails to convey the range of restrictions that must be present before a technology for which non-U.S. sources exist is not available without restriction. Such restrictions on availability might be statutes, treaties, administrative practice, or even policy. Such restrictions might be effective or ineffective. DOD and

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other U.S. Government agencies and departments may find it necessary to seek further guidance from Congress on this issue before making suggestions about the exact wording of regulations implementing controls on items on the U.S. CCL.

A related area pertaining to questions of foreign availability has to do with the exact meaning of comparable quality as used in Sections 4 and 5 of the Export Administration Act. DOD may find it useful to examine those technologies and those products alleged to be comparable in quality to U.S.-origin items on the MCTL to determine if such items have equivalent capability. DOD may wish to examine the analytical parameters to be used to determine quality comparability. In addition, DOD may find it useful to compare and contrast the data and analysis requirements for comparability standards in terms of the intelligence requirements they generate and the costs of fulfilling differing intelligence requirements.

Another aspect of foreign availability on which DOD may wish to undertake further studies has to do with determining significant quantities of comparable quality products or technology available from non-U.S. sources without restriction. Some items on the MCTL such as keystone materials might be militarily critical only in large quantities. Other MCTL items such as an area of design or manufacturing know-how might be militarily critical if only one such array is available without any type of legal, administrative, political, or commercial restrictions from non-U.S. sources.

A fourth issue pertaining to foreign availability is the manner and degree to which it should be considered by DOD in formulating the MCTL. One view holds that foreign availability should not be taken into account in formulating the MCTL. This view contends that military significance is the only issue in determining whether or not a technology, its keystone equipment, or its keystone materials have intrinsic or aggregate military utility. Another view holds that foreign availability as defined

by the law should be factored into an evaluation of technology to be placed on the MCTL. This view holds that DOD should construct its MCTL in a manner similar to that used by Commerce in constructing the broader CCL, thereby reducing the likelihood of internal Executive Branch disagreements on the list of commodities, products, and technologies subject to national security export controls. DOD may find it desirable to seek clarification from Congress on the degree to which foreign availability should or should not be used in developing subsequent versions of the MCTL.

These issues relating to further elaboration of foreign availability will be increasingly important as the U.S. transfers MCTL items to our European and other allies who in turn make MCTL items available to their trading partners.

C. GOODS, PRODUCTS, AND TECHNOLOGY

A third issue requiring further study has to do with the distinction between products or goods on the one hand and technology on the other. The IDA study uses one set of definitions in a relatively consistent manner; however, alternative boundaries are conceivable. Alternative definitions of goods, products, and technologies may in fact be desirable given differences in the COCOM members' domestic export control laws, regulations, or practices which may not permit them to assert controls over what IDA has termed technology but which might nevertheless authorize control over goods or products.

There is also some confusion within the relevant export control community over distinctions between goods, products, services, technical data, and technology which might profitably be clarified for more complete implementation of the critical technologies approach to export controls.

D. RECTIFICATION OF EXPORT CONTROL LISTS

As was noted in the earlier discussion of the possible uses of the initial version of the MCTL, it seems likely that the MCTL would be used as a guide to, or perhaps as the basis of, review and revision of other export control lists. Whereas DOD inputs to the U.S. Munitions List, the U.S. Nuclear List, the COCOM CCL and the COCOM Munitions List are welcomed or required by statute, it is appropriate that DOD capitalize on the experience gained in the MCTL exercise and undertake reviews of the other lists. Use of the MCTL may be most helpful in identifying products on the U.S. Munitions List that should not be decontrolled pursuant to the study requirements of Section 108 of the International Security and Development Cooperation Act of 1980. Specifically, the MCTL could be used to identify dual-purpose technology used to design, manufacture, operate or maintain U.S. Munitions List items. Such items would be most in need of protection and control afforded by the Arms Export Control Act.

A review of the U.S. Munitions List from the critical technologies perspective would also help DOD carry out its responsibilities under Section 36 of the Arms Export Control Act, which requires that DOD include in each notification of FMS to Congress a statement with respect to the sensitivity of the technology incorporated in the weapons system.

A DOD review of the U.S. Munitions List would also lay the foundation for a farther-reaching review of the COCOM Munitions List. The latter list will probably be reviewed in the near future, either in its own right or by virtue of the prospect of increasing sales of COCOM Munitions List items to such countries as Romania, Yugoslavia, and the PRC. While DOD does not have sole responsibility for the COCOM list reviews, it certainly has a vital stake in seeing that those items on the list--products or technologies--which it believes represent the most significant differences between U.S. and Allied capability versus potential adversary capability continue to be tightly controlled.

While other issues meriting further DOD attention can be readily identified, the four broad issue areas outlined above appear to be key problems requiring immediate attention if any effort to effectively implement the critical technologies approach is to be undertaken in the coming months.

VIII. THE UTILITY OF THE CRITICAL TECHNOLOGIES APPROACH TO EXPORT CONTROLS

No discussion of the critical technologies approach to export controls and the requirement that the Defense Department develop and promulgate a list of critical military technologies would be complete if some observations about the utility of this approach were not ventured. The following chapter sets forth some personal views on the utility of the MCTL exercise as well as the value of the critical technologies approach to export controls.

A. APPLICATION OF CRITICAL TECHNOLOGIES APPROACH TO EXPORT CONTROLS

The critical technologies approach to export control in my view has considerable merit at least as an analytical tool if not as an operational system for the management of export controls. First, the critical technologies approach permits greater differentiation among technologies to be controlled as well as the types of controls to be applied. Implicit in the critical technologies approach to export control is the concept of more restrictive controls applied to particular technologies up to and including embargoes, but less substantial or less inhibitory controls applied to technologies with lesser payoff to a potential military adversary should he choose to use such technologies for military purposes.

Second, the critical technologies approach consciously recognizes technological change and innovation and takes it into account in the export control process. The critical technologies approach implies that export applications for emerging technologies will be subject to the most careful review precisely because the uses of such technologies are not clear. Once

those uses of emerging technologies have become clear, the critical technologies approach to export control permits more or less carefully constrained trade in such recently emerging but now defined technologies, whereas a less careful approach to export controls might continue to leave restrictions in place long after they were needed for national security purposes. The criteria by which critical technologies are identified may require further refinement to reflect the need to identify and monitor emerging technologies.

Third, an important analytical contribution to export controls is made by the critical technologies approach in its conscious understanding of the cumulative and interactive effects of technologies among one another. As a result, the critical technologies approach should stimulate the consideration within the export control community of the multiple uses associated with any one technology. The critical technologies approach enables the export control community to more clearly identify the terms and conditions under which such exports should or should not be permitted.

Finally, the critical technologies approach should facilitate an evaluation of the United States technology base, more prioritization of effort within the research and development community, and effective resource allocation. In order for the United States Government to properly and carefully administer export controls, the critical technologies approach requires that the state of U.S. technology be assessed. In so doing, the United States Government must identify those promising areas of technology where the United States enjoys a lead or lags behind other nations, requiring further support and stimulation. In an era of declining real budgetary resources, evaluative tools which enable managers to better utilize scarce funds are always welcome.

B. VALUE OF THE MCTL

The utility of the militarily critical technologies list is difficult to evaluate. One problem which looms very prominently on the horizon is the potential for sharp criticism of the export control community should the MCTL not result in significant changes in any direction to the export licensing process. While such an outcome would not be entirely surprising, I believe the export control community will find the MCTL helpful in two respects. First, the MCTL will shift the boundaries among the subsets of license applications. The subset of license applications formerly thought to merit automatic rejection should now become somewhat smaller. The subset of license applications which in the past required rather intense study should also narrow somewhat. Finally, the subset of license applications which require little or no review but can be approved in a straightforward manner should increase as the MCTL is further refined and technologies or goods which embody such technologies are properly identified. While such an outcome would be highly desirable from the standpoint of vigorous U.S. trade, it is equally clear that a substantial body of opinion holds that too much technology is already leaving the United States or our allies destined for the Soviet Union, other Warsaw Treaty Organization members, or the PRC. Those who hold such a view ultimately may find the MCTL helpful in substantiating the claims made by other advocates of renewed economic warfare with the Soviet Union and its Eastern European allies.

The lasting value of the MCTL, however, lies not only in the list, but in the documentation developed in support of the list, and in the research analysis which in turn supports the documentation. While the list by itself meets the statutory requirements, the exercise has been most successful in the development of the supporting documentation which will be most useful in my view for licensing officials. Licensing officials with access to IDA technical reports will now have a standard set of reference

tools which should enable each official to review independently any application and agree on the terms and conditions under which a license should be granted for sales to a destination in Eastern Europe, the Soviet Union or the PRC. Hence, government, industry, and foreign customers of U.S.-origin products and technology should benefit from more consistent treatment of export license applications.

Perhaps even more important, however, is the use of the MCTL and its supporting documentation in the development of a strong and reasonable United States Government position with respect to multilateral negotiations on export controls. There has been much criticism of the COCOM partners for their failure to adhere to the terms of the informal agreement which created COCOM and rigorously apply multilateral export controls. Some of the criticism has been perhaps self-defeating, for the United States exercises a range of controls over products, services, and technology which differs from that exercised by our COCOM partners.

The MCTL and its supporting documentation now gives the U.S. Government a set of arguments, a set of documents, and a set of other tools which can be used diplomatically to explain, encourage, and analytically demonstrate the value of the critical technologies approach to export controls to our COCOM partners. One would like to believe that successful representations on the part of the U.S. Government based on the MCTL and its accompanying documentation will lead to a more sympathetic hearing of the critical technologies approach to export control in COCOM than it has received in the past.

It is too early to state with high confidence that the critical technologies approach to export control will prove revolutionary in its impact on the U.S. national security, export controls, and international trade position. However, the critical technologies approach should improve communications among U.S. Government agencies, between the U.S. Government and the international commercial sector of the American economy, and between

the U.S. Government and its partners in multilateral export control. To the extent that export controls play a useful and important role in preserving and enhancing U.S. national security and promoting foreign policy, the critical technologies approach and the MCTL, as mandated in Section 5 of the Export Administration Act of 1979, merit further consideration in the context of other export control activities.

C. INTENT OF CONGRESS

The intent of the Congress in enacting Section 5 of the Export Administration Act of 1979, providing national security export controls, is not always clear from a straightforward reading of the document. This report has attempted to shed some further light on what Congress wanted the Executive Branch to do when it enacted Section 5. The study has endeavored to outline the provisions of Section 5 and place them in the somewhat broader context not only of Congressional concern with the maintenance of the technological lead time of the United States over the Soviet Union, but also the more general desires of the Congress for the United States to play a role in stabilizing the international politico-military environment. The willingness of Congress to support such a role for the United States should be taken as an encouraging sign by those who believe that the destiny of the American people remains firmly bound to the destinies of all other peoples of the world. The Export Administration Act of 1979 demonstrates a continuing desire on the part of the Congress for the United States Government to play a leading international role, mindful of our domestic national security interests, but committed nevertheless to a stable and peaceful international system.

EXPORT ADMINISTRATION ACT OF 1979

A-1

Public Law 96-72
96th Congress

An Act

To provide authority to regulate exports, to improve the efficiency of export regulation, and to minimize interference with the ability to engage in commerce

Sept. 29, 1979
[S. 737]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Export
Administration
Act of 1979

SHORT TITLE

SECTION 1. This Act may be cited as the "Export Administration Act of 1979".

50 USC app. 2401
note

FINDINGS

SEC. 2. The Congress makes the following findings:

50 USC app.
2401.

(1) The ability of United States citizens to engage in international commerce is a fundamental concern of United States policy.

(2) Exports contribute significantly to the economic well-being of the United States and the stability of the world economy by increasing employment and production in the United States, and by strengthening the trade balance and the value of the United States dollar, thereby reducing inflation. The restriction of exports from the United States can have serious adverse effects on the balance of payments and on domestic employment, particularly when restrictions applied by the United States are more extensive than those imposed by other countries.

(3) It is important for the national interest of the United States that both the private sector and the Federal Government place a high priority on exports, which would strengthen the Nation's economy.

(4) The availability of certain materials at home and abroad varies so that the quantity and composition of United States exports and their distribution among importing countries may affect the welfare of the domestic economy and may have an important bearing upon fulfillment of the foreign policy of the United States.

(5) Exports of goods or technology without regard to whether they make a significant contribution to the military potential of individual countries or combinations of countries may adversely affect the national security of the United States.

(6) Uncertainty of export control policy can curtail the efforts of American business to the detriment of the overall attempt to improve the trade balance of the United States.

(7) Unreasonable restrictions on access to world supplies can cause worldwide political and economic instability, interfere with free international trade, and retard the growth and development of nations.

(8) It is important that the administration of export controls imposed for national security purposes give special emphasis to the need to control exports of technology and goods which

contribute significantly to the transfer of such technology) which could make a significant contribution to the military potential of any country or combination of countries which would be detrimental to the national security of the United States.

(9) Minimization of restrictions on exports of agricultural commodities and products is of critical importance to the maintenance of a sound agricultural sector, to achievement of a positive balance of payments, to reducing the level of Federal expenditures for agricultural support programs, and to United States cooperation in efforts to eliminate malnutrition and world hunger.

DECLARATION OF POLICY

50 USC app.
2402.

SEC. 3. The Congress makes the following declarations:

(1) It is the policy of the United States to minimize uncertainties in export control policy and to encourage trade with all countries with which the United States has diplomatic or trading relations, except those countries with which such trade has been determined by the President to be against the national interest.

(2) It is the policy of the United States to use export controls only after full consideration of the impact on the economy of the United States and only to the extent necessary—

(A) to restrict the export of goods and technology which would make a significant contribution to the military potential of any other country or combination of countries which would prove detrimental to the national security of the United States;

(B) to restrict the export of goods and technology where necessary to further significantly the foreign policy of the United States or to fulfill its declared international obligations; and

(C) to restrict the export of goods where necessary to protect the domestic economy from the excessive drain of scarce materials and to reduce the serious inflationary impact of foreign demand.

(3) It is the policy of the United States (A) to apply any necessary controls to the maximum extent possible in cooperation with all nations, and (B) to encourage observance of a uniform export control policy by all nations with which the United States has defense treaty commitments.

(4) It is the policy of the United States to use its economic resources and trade potential to further the sound growth and stability of its economy as well as to further its national security and foreign policy objectives.

(5) It is the policy of the United States—

(A) to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States or against any United States person;

(B) to encourage and, in specified cases, require United States persons engaged in the export of goods or technology or other information to refuse to take actions, including furnishing information or entering into or implementing agreements, which have the effect of furthering or supporting the restrictive trade practices or boycotts fostered or imposed by any foreign country against a country friendly to the United States or against any United States person; and

(C) to foster international cooperation and the development of international rules and institutions to assure reasonable access to world supplies.

(6) It is the policy of the United States that the desirability of subjecting, or continuing to subject, particular goods or technology or other information to United States export controls should be subjected to review by and consultation with representatives of appropriate United States Government agencies and private industry.

(7) It is the policy of the United States to use export controls, including license fees, to secure the removal by foreign countries of restrictions on access to supplies where such restrictions have or may have a serious domestic inflationary impact, have caused or may cause a serious domestic shortage, or have been imposed for purposes of influencing the foreign policy of the United States. In effecting this policy, the President shall make every reasonable effort to secure the removal or reduction of such restrictions, policies, or actions through international cooperation and agreement before resorting to the imposition of controls on exports from the United States. No action taken in fulfillment of the policy set forth in this paragraph shall apply to the export of medicine or medical supplies.

(8) It is the policy of the United States to use export controls to encourage other countries to take immediate steps to prevent the use of their territories or resources to aid, encourage, or give sanctuary to those persons involved in directing, supporting, or participating in acts of international terrorism. To achieve this objective, the President shall make every reasonable effort to secure the removal or reduction of such assistance to international terrorists through international cooperation and agreement before resorting to the imposition of export controls.

(9) It is the policy of the United States to cooperate with other countries with which the United States has defense treaty commitments in restricting the export of goods and technology which would make a significant contribution to the military potential of any country or combination of countries which would prove detrimental to the security of the United States and of those countries with which the United States has defense treaty commitments.

(10) It is the policy of the United States that export trade by United States citizens be given a high priority and not be controlled except when such controls (A) are necessary to further fundamental national security, foreign policy, or short supply objectives, (B) will clearly further such objectives, and (C) are administered consistent with basic standards of due process.

(11) It is the policy of the United States to minimize restrictions on the export of agricultural commodities and products.

GENERAL PROVISIONS

SEC. 4. (a) TYPES OF LICENSES.—Under such conditions as may be imposed by the Secretary which are consistent with the provisions of this Act, the Secretary may require any of the following types of export licenses:

50 USC app.
2403.

(1) A validated license, authorizing a specific export, issued pursuant to an application by the exporter.

(2) A qualified general license, authorizing multiple exports, issued pursuant to an application by the exporter.

(3) A general license, authorizing exports, without application by the exporter.

(4) Such other licenses as may assist in the effective and efficient implementation of this Act.

(b) **COMMODITY CONTROL LIST.**—The Secretary shall establish and maintain a list (hereinafter in this Act referred to as the "commodity control list") consisting of any goods or technology subject to export controls under this Act.

(c) **FOREIGN AVAILABILITY.**—In accordance with the provisions of this Act, the President shall not impose export controls for foreign policy or national security purposes on the export from the United States of goods or technology which he determines are available without restriction from sources outside the United States in significant quantities and comparable in quality to those produced in the United States, unless the President determines that adequate evidence has been presented to him demonstrating that the absence of such controls would prove detrimental to the foreign policy or national security of the United States.

(d) **RIGHT OF EXPORT.**—No authority or permission to export may be required under this Act, or under regulations issued under this Act, except to carry out the policies set forth in section 3 of this Act.

(e) **DELEGATION OF AUTHORITY.**—The President may delegate the power, authority, and discretion conferred upon him by this Act to such departments, agencies, or officials of the Government as he may consider appropriate, except that no authority under this Act may be delegated to, or exercised by, any official of any department or agency the head of which is not appointed by the President, by and with the advice and consent of the Senate. The President may not delegate or transfer his power, authority, and discretion to overrule or modify any recommendation or decision made by the Secretary, the Secretary of Defense, or the Secretary of State pursuant to the provisions of this Act.

(f) **NOTIFICATION OF THE PUBLIC; CONSULTATION WITH BUSINESS.**—The Secretary shall keep the public fully apprised of changes in export control policy and procedures instituted in conformity with this Act with a view to encouraging trade. The Secretary shall meet regularly with representatives of the business sector in order to obtain their views on export control policy and the foreign availability of goods and technology.

NATIONAL SECURITY CONTROLS

50 USC app.
2404.

SEC. 5. (a) AUTHORITY.—(1) In order to carry out the policy set forth in section 3(2)(A) of this Act, the President may, in accordance with the provisions of this section, prohibit or curtail the export of any goods or technology subject to the jurisdiction of the United States or exported by any person subject to the jurisdiction of the United States. The authority contained in this subsection shall be exercised by the Secretary, in consultation with the Secretary of Defense, and such other departments and agencies as the Secretary considers appropriate, and shall be implemented by means of export licenses described in section 4(a) of this Act.

(2)(A) Whenever the Secretary makes any revision with respect to any goods or technology, or with respect to the countries or destinations, affected by export controls imposed under this section, the Secretary shall publish in the Federal Register a notice of such revision and shall specify in such notice that the revision relates to controls imposed under the authority contained in this section.

Publication in
Federal
Register.

(B) Whenever the Secretary denies any export license under this section, the Secretary shall specify in the notice to the applicant of the denial of such license that the license was denied under the authority contained in this section. The Secretary shall also include in such notice what, if any, modifications in or restrictions on the goods or technology for which the license was sought would allow such export to be compatible with controls imposed under this section, or the Secretary shall indicate in such notice which officers and employees of the Department of Commerce who are familiar with the application will be made reasonably available to the applicant for consultation with regard to such modifications or restriction, if appropriate.

Export license
denial, notice

(3) In issuing regulations to carry out this section, particular attention shall be given to the difficulty of devising effective safeguards to prevent a country that poses a threat to the security of the United States from diverting critical technologies to military use, the difficulty of devising effective safeguards to protect critical goods, and the need to take effective measures to prevent the reexport of critical technologies from other countries to countries that pose a threat to the security of the United States. Such regulations shall not be based upon the assumption that such effective safeguards can be devised.

Regulatory
safeguards for
U.S. security

(b) **POLICY TOWARD INDIVIDUAL COUNTRIES.**—In administering export controls for national security purposes under this section, United States policy toward individual countries shall not be determined exclusively on the basis of a country's Communist or non-Communist status but shall take into account such factors as the country's present and potential relationship to the United States, its present and potential relationship to countries friendly or hostile to the United States, its ability and willingness to control retransfers of United States exports in accordance with United States policy, and such other factors as the President considers appropriate. The President shall review not less frequently than every three years in the case of controls maintained cooperatively with other nations, and annually in the case of all other controls, United States policy toward individual countries to determine whether such policy is appropriate in light of the factors specified in the preceding sentence.

(c) **CONTROL LIST.**—(1) The Secretary shall establish and maintain, as part of the commodity control list, a list of all goods and technology subject to export controls under this section. Such goods and technology shall be clearly identified as being subject to controls under this section.

(2) The Secretary of Defense and other appropriate departments and agencies shall identify goods and technology for inclusion on the list referred to in paragraph (1). Those items which the Secretary and the Secretary of Defense concur shall be subject to export controls under this section shall comprise such list. If the Secretary and the Secretary of Defense are unable to concur on such items, the matter shall be referred to the President for resolution.

(3) The Secretary shall issue regulations providing for review of the list established pursuant to this subsection not less frequently than every 3 years in the case of controls maintained cooperatively with other countries, and annually in the case of all other controls, in order to carry out the policy set forth in section 3(2)(A) and the provisions of this section, and for the prompt issuance of such revisions of the list as may be necessary. Such regulations shall provide interested Government agencies and other affected or potentially affected parties with an opportunity, during such review, to submit written data, views, or arguments, with or without oral presentation. Such regulations shall further provide that, as part of

Regulations

Submittal of
written data,
views, or
arguments

such review, an assessment be made of the availability from sources outside the United States, or any of its territories or possessions, of goods and technology comparable to those controlled under this section. The Secretary and any agency rendering advice with respect to export controls shall keep adequate records of all decisions made with respect to revision of the list of controlled goods and technology, including the factual and analytical basis for the decision, and, in the case of the Secretary, any dissenting recommendations received from any agency.

Review.

(d) **MILITARILY CRITICAL TECHNOLOGIES.**—(1) The Secretary, in consultation with the Secretary of Defense, shall review and revise the list established pursuant to subsection (c), as prescribed in paragraph (3) of such subsection, for the purpose of insuring that export controls imposed under this section cover and (to the maximum extent consistent with the purposes of this Act) are limited to militarily critical goods and technologies and the mechanisms through which such goods and technologies may be effectively transferred.

(2) The Secretary of Defense shall bear primary responsibility for developing a list of militarily critical technologies. In developing such list, primary emphasis shall be given to—

(A) arrays of design and manufacturing know-how,

(B) keystone manufacturing, inspection, and test equipment, and

(C) goods accompanied by sophisticated operation, application, or maintenance know-how,

which are not possessed by countries to which exports are controlled under this section and which, if exported, would permit a significant advance in a military system of any such country.

(3) The list referred to in paragraph (2) shall be sufficiently specific to guide the determinations of any official exercising export licensing responsibilities under this Act.

Publication in Federal Register.

(4) The initial version of the list referred to in paragraph (2) shall be completed and published in an appropriate form in the Federal Register not later than October 1, 1980.

(5) The list of militarily critical technologies developed primarily by the Secretary of Defense pursuant to paragraph (2) shall become a part of the commodity control list, subject to the provisions of subsection (c) of this section.

Report to Congress.

(6) The Secretary of Defense shall report annually to the Congress on actions taken to carry out this subsection.

(e) **EXPORT LICENSES.**—(1) The Congress finds that the effectiveness and efficiency of the process of making export licensing determinations under this section is severely hampered by the large volume of validated export license applications required to be submitted under this Act. Accordingly, it is the intent of Congress in this subsection to encourage the use of a qualified general license in lieu of a validated license.

Validated licenses, requirement.

(2) To the maximum extent practicable, consistent with the national security of the United States, the Secretary shall require a validated license under this section for the export of goods or technology only if—

(A) the export of such goods or technology is restricted pursuant to a multilateral agreement, formal or informal, to which the United States is a party and, under the terms of such multilateral agreement, such export requires the specific approval of the parties to such multilateral agreement;

(B) with respect to such goods or technology, other nations do not possess capabilities comparable to those possessed by the United States; or

(C) the United States is seeking the agreement of other suppliers to apply comparable controls to such goods or technology and, in the judgment of the Secretary, United States export controls on such goods or technology, by means of such license, are necessary pending the conclusion of such agreement.

(3) To the maximum extent practicable, consistent with the national security of the United States, the Secretary shall require a qualified general license, in lieu of a validated license, under this section for the export of goods or technology if the export of such goods or technology is restricted pursuant to a multilateral agreement, formal or informal, to which the United States is a party, but such export does not require the specific approval of the parties to such multilateral agreement.

Qualified
general license

(4) Not later than July 1, 1980, the Secretary shall establish procedures for the approval of goods and technology that may be exported pursuant to a qualified general license.

(f) FOREIGN AVAILABILITY.—(1) The Secretary, in consultation with appropriate Government agencies and with appropriate technical advisory committees established pursuant to subsection (h) of this section, shall review, on a continuing basis, the availability, to countries to which exports are controlled under this section, from sources outside the United States, including countries which participate with the United States in multilateral export controls, of any goods or technology the export of which requires a validated license under this section. In any case in which the Secretary determines, in accordance with procedures and criteria which the Secretary shall by regulation establish, that any such goods or technology are available in fact to such destinations from such sources in sufficient quantity and of sufficient quality so that the requirement of a validated license for the export of such goods or technology is or would be ineffective in achieving the purpose set forth in subsection (a) of this section, the Secretary may not, after the determination is made, require a validated license for the export of such goods or technology during the period of such foreign availability, unless the President determines that the absence of export controls under this section would prove detrimental to the national security of the United States. In any case in which the President determines that export controls under this section must be maintained notwithstanding foreign availability, the Secretary shall publish that determination together with a concise statement of its basis, and the estimated economic impact of the decision.

Review

Export controls
maintenance

(2) The Secretary shall approve any application for a validated license which is required under this section for the export of any goods or technology to a particular country and which meets all other requirements for such an application, if the Secretary determines that such goods or technology will, if the license is denied, be available in fact to such country from sources outside the United States, including countries which participate with the United States in multilateral export controls, in sufficient quantity and of sufficient quality so that denial of the license would be ineffective in achieving the purpose set forth in subsection (a) of this section, subject to the exception set forth in paragraph (1) of this subsection. In any case in which the Secretary makes a determination of foreign availability under this paragraph with respect to any goods or technology, the Secretary shall determine whether a determination of foreign availability under paragraph (1) with respect to such goods or technology is warranted.

Validated
license approval

(3) With respect to export controls imposed under this section, any determination of foreign availability which is the basis of a decision

to grant a license for, or to remove a control on, the export of a good or technology, shall be made in writing and shall be supported by reliable evidence, including scientific or physical examination, expert opinion based upon adequate factual information, or intelligence information. In assessing foreign availability with respect to license applications, uncorroborated representations by applicants shall not be deemed sufficient evidence of foreign availability.

(4) In any case in which, in accordance with this subsection, export controls are imposed under this section notwithstanding foreign availability, the President shall take steps to initiate negotiations with the governments of the appropriate foreign countries for the purpose of eliminating such availability. Whenever the President has reason to believe goods or technology subject to export control for national security purposes by the United States may become available from other countries to countries to which exports are controlled under this section and that such availability can be prevented or eliminated by means of negotiations with such other countries, the President shall promptly initiate negotiations with the governments of such other countries to prevent such foreign availability.

Information
gathering.

(5) In order to further carry out the policies set forth in this Act, the Secretary shall establish, within the Office of Export Administration of the Department of Commerce, a capability to monitor and gather information with respect to the foreign availability of any goods or technology subject to export controls under this Act.

(6) Each department or agency of the United States with responsibilities with respect to export controls, including intelligence agencies, shall, consistent with the protection of intelligence sources and methods, furnish information to the Office of Export Administration concerning foreign availability of goods and technology subject to export controls under this Act, and such Office, upon request or where appropriate, shall furnish to such departments and agencies the information it gathers and receives concerning foreign availability.

Regulations.

(g) INDEXING.—In order to ensure that requirements for validated licenses and qualified general licenses are periodically removed as goods or technology subject to such requirements become obsolete with respect to the national security of the United States, regulations issued by the Secretary may, where appropriate, provide for annual increases in the performance levels of goods or technology subject to any such licensing requirement. Any such goods or technology which no longer meet the performance levels established by the latest such increase shall be removed from the list established pursuant to subsection (c) of this section unless, under such exceptions and under such procedures as the Secretary shall prescribe, any other department or agency of the United States objects to such removal and the Secretary determines, on the basis of such objection, that the goods or technology shall not be removed from the list. The Secretary shall also consider, where appropriate, removing site visitation requirements for goods and technology which are removed from the list unless objections described in this subsection are raised.

Site visitation
requirements,
removal.

(h) TECHNICAL ADVISORY COMMITTEES.—(1) Upon written request by representatives of a substantial segment of any industry which produces any goods or technology subject to export controls under this section or being considered for such controls because of their significance to the national security of the United States, the Secretary shall appoint a technical advisory committee for any such goods or technology which the Secretary determines are difficult to evaluate because of questions concerning technical matters, worldwide availability, and actual utilization of production and technology, or

licensing procedures. Each such committee shall consist of representatives of United States industry and Government, including the Departments of Commerce, Defense, and State and, in the discretion of the Secretary, other Government departments and agencies. No person serving on any such committee who is a representative of industry shall serve on such committee for more than four consecutive years.

Membership

Term of office.

(2) Technical advisory committees established under paragraph (1) shall advise and assist the Secretary, the Secretary of Defense, and any other department, agency, or official of the Government of the United States to which the President delegates authority under this Act, with respect to actions designed to carry out the policy set forth in section 3(2)(A) of this Act. Such committees, where they have expertise in such matters, shall be consulted with respect to questions involving (A) technical matters, (B) worldwide availability and actual utilization of production technology, (C) licensing procedures which affect the level of export controls applicable to any goods or technology, and (D) exports subject to multilateral controls in which the United States participates, including proposed revisions of any such multilateral controls. Nothing in this subsection shall prevent the Secretary or the Secretary of Defense from consulting, at any time, with any person representing industry or the general public, regardless of whether such person is a member of a technical advisory committee. Members of the public shall be given a reasonable opportunity, pursuant to regulations prescribed by the Secretary, to present evidence to such committees.

(3) Upon request of any member of any such committee, the Secretary may, if the Secretary determines it appropriate, reimburse such member for travel, subsistence, and other necessary expenses incurred by such member in connection with the duties of such member.

Travel and other expenses, reimbursement.

(4) Each such committee shall elect a chairman, and shall meet at least every three months at the call of the chairman, unless the chairman determines, in consultation with the other members of the committee, that such a meeting is not necessary to achieve the purposes of this subsection. Each such committee shall be terminated after a period of 2 years, unless extended by the Secretary for additional periods of 2 years. The Secretary shall consult each such committee with respect to such termination or extension of that committee.

Termination.

(5) To facilitate the work of the technical advisory committees, the Secretary, in conjunction with other departments and agencies participating in the administration of this Act, shall disclose to each such committee adequate information, consistent with national security, pertaining to the reasons for the export controls which are in effect or contemplated for the goods or technology with respect to which that committee furnishes advice.

(6) Whenever a technical advisory committee certifies to the Secretary that goods or technology with respect to which such committee was appointed have become available in fact, to countries to which exports are controlled under this section, from sources outside the United States, including countries which participate with the United States in multilateral export controls, in sufficient quantity and of sufficient quality so that requiring a validated license for the export of such goods or technology would be ineffective in achieving the purpose set forth in subsection (a) of this section, and provides adequate documentation for such certification, in accordance with the procedures established pursuant to subsection (f)(1) of this section, the Secretary shall investigate such availability, and if

Export controls maintenance.

Determination,
publication.

Coordinating
Committee,
functions.

such availability is verified, the Secretary shall remove the requirement of a validated license for the export of the goods or technology, unless the President determines that the absence of export controls under this section would prove detrimental to the national security of the United States. In any case in which the President determines that export controls under this section must be maintained notwithstanding foreign availability, the Secretary shall publish that determination together with a concise statement of its basis and the estimated economic impact of the decision.

(i) **MULTILATERAL EXPORT CONTROLS.**—The President shall enter into negotiations with the governments participating in the group known as the Coordinating Committee (hereinafter in this subsection referred to as the "Committee") with a view toward accomplishing the following objectives:

(1) Agreement to publish the list of items controlled for export by agreement of the Committee, together with all notes, understandings, and other aspects of such agreement of the Committee, and all changes thereto.

(2) Agreement to hold periodic meetings with high-level representatives of such governments, for the purpose of discussing export control policy issues and issuing policy guidance to the Committee.

(3) Agreement to reduce the scope of the export controls imposed by agreement of the Committee to a level acceptable to and enforceable by all governments participating in the Committee.

(4) Agreement on more effective procedures for enforcing the export controls agreed to pursuant to paragraph (3).

(j) **COMMERCIAL AGREEMENTS WITH CERTAIN COUNTRIES.**—(1) Any United States firm, enterprise, or other nongovernmental entity which, for commercial purposes, enters into any agreement with any agency of the government of a country to which exports are restricted for national security purposes, which agreement cites an intergovernmental agreement (to which the United States and such country are parties) calling for the encouragement of technical cooperation and is intended to result in the export from the United States to the other party of unpublished technical data of United States origin, shall report the agreement with such agency to the Secretary.

(2) The provisions of paragraph (1) shall not apply to colleges, universities, or other educational institutions.

(k) **NEGOTIATIONS WITH OTHER COUNTRIES.**—The Secretary of State, in consultation with the Secretary of Defense, the Secretary of Commerce, and the heads of other appropriate departments and agencies, shall be responsible for conducting negotiations with other countries regarding their cooperation in restricting the export of goods and technology in order to carry out the policy set forth in section 3(9) of this Act, as authorized by subsection (a) of this section, including negotiations with respect to which goods and technology should be subject to multilaterally agreed export restrictions and what conditions should apply for exceptions from those restrictions.

(l) **DIVERSION TO MILITARY USE OF CONTROLLED GOODS OR TECHNOLOGY.**—(1) Whenever there is reliable evidence that goods or technology, which were exported subject to national security controls under this section to a country to which exports are controlled for national security purposes, have been diverted to significant military use in violation of the conditions of an export license, the Secretary for as long as that diversion to significant military use continues—

(A) shall deny all further exports to the party responsible for that diversion of any goods or technology subject to national

security controls under this section which contribute to that particular military use, regardless of whether such goods or technology are available to that country from sources outside the United States; and

(B) may take such additional steps under this Act with respect to the party referred to in subparagraph (A) as are feasible to deter the further military use of the previously exported goods or technology.

(2) As used in this subsection, the terms "diversion to significant military use" and "significant military use" means the use of United States goods or technology to design or produce any item on the United States Munitions List.

"Diversion to significant military use" and "significant military use".

FOREIGN POLICY CONTROLS

SEC. 6. (a) **AUTHORITY.**—(1) In order to carry out the policy set forth in paragraph (2)(B), (7), or (8) of section 3 of this Act, the President may prohibit or curtail the exportation of any goods, technology, or other information subject to the jurisdiction of the United States or exported by any person subject to the jurisdiction of the United States, to the extent necessary to further significantly the foreign policy of the United States or to fulfill its declared international obligations. The authority granted by this subsection shall be exercised by the Secretary, in consultation with the Secretary of State and such other departments and agencies as the Secretary considers appropriate, and shall be implemented by means of export licenses issued by the Secretary.

50 USC app.
2405.

(2) Export controls maintained for foreign policy purposes shall expire on December 31, 1979, or one year after imposition, whichever is later, unless extended by the President in accordance with subsections (b) and (e). Any such extension and any subsequent extension shall not be for a period of more than one year.

Expiration date.

(3) Whenever the Secretary denies any export license under this subsection, the Secretary shall specify in the notice to the applicant of the denial of such license that the license was denied under the authority contained in this subsection, and the reasons for such denial, with reference to the criteria set forth in subsection (b) of this section. The Secretary shall also include in such notice what, if any, modifications in or restrictions on the goods or technology for which the license was sought would allow such export to be compatible with controls implemented under this section, or the Secretary shall indicate in such notice which officers and employees of the Department of Commerce who are familiar with the application will be made reasonably available to the applicant for consultation with regard to such modifications or restrictions, if appropriate.

Export license denial.

(4) In accordance with the provisions of section 10 of this Act, the Secretary of State shall have the right to review any export license application under this section which the Secretary of State requests to review.

Export license application, review.

(b) **CRITERIA.**—When imposing, expanding, or extending export controls under this section, the President shall consider—

(1) the probability that such controls will achieve the intended foreign policy purpose, in light of other factors, including the availability from other countries of the goods or technology proposed for such controls;

(2) the compatibility of the proposed controls with the foreign policy objectives of the United States, including the effort to counter international terrorism, and with overall United States

policy toward the country which is the proposed target of the controls;

(3) the reaction of other countries to the imposition or expansion of such export controls by the United States;

(4) the likely effects of the proposed controls on the export performance of the United States, on the competitive position of the United States in the international economy, on the international reputation of the United States as a supplier of goods and technology, and on individual United States companies and their employees and communities, including the effects of the controls on existing contracts;

(5) the ability of the United States to enforce the proposed controls effectively; and

(6) the foreign policy consequences of not imposing controls.

(c) **CONSULTATION WITH INDUSTRY.**—The Secretary, before imposing export controls under this section, shall consult with such affected United States industries as the Secretary considers appropriate, with respect to the criteria set forth in paragraphs (1) and (4) of subsection (b) and such other matters as the Secretary considers appropriate.

(d) **ALTERNATIVE MEANS.**—Before resorting to the imposition of export controls under this section, the President shall determine that reasonable efforts have been made to achieve the purposes of the controls through negotiations or other alternative means.

(e) **NOTIFICATION TO CONGRESS.**—The President in every possible instance shall consult with the Congress before imposing any export control under this section. Except as provided in section 7(g)(3) of this Act, whenever the President imposes, expands, or extends export controls under this section, the President shall immediately notify the Congress of such action and shall submit with such notification a report specifying—

(1) the conclusions of the President with respect to each of the criteria set forth in subsection (b); and

(2) the nature and results of any alternative means attempted under subsection (d), or the reasons for imposing, extending, or expanding the control without attempting any such alternative means.

Such report shall also indicate how such controls will further significantly the foreign policy of the United States or will further its declared international obligations. To the extent necessary to further the effectiveness of such export control, portions of such report may be submitted on a classified basis, and shall be subject to the provisions of section 12(c) of this Act.

(f) **EXCLUSION FOR MEDICINE AND MEDICAL SUPPLIES.**—This section does not authorize export controls on medicine or medical supplies. It is the intent of Congress that the President not impose export controls under this section on any goods or technology if he determines that the principal effect of the export of such goods or technology would be to help meet basic human needs. This subsection shall not be construed to prohibit the President from imposing restrictions on the export of medicine or medical supplies, under the International Emergency Economic Powers Act. This subsection shall not apply to any export control on medicine or medical supplies which is in effect on the effective date of this Act.

(g) **FOREIGN AVAILABILITY.**—In applying export controls under this section, the President shall take all feasible steps to initiate and conclude negotiations with appropriate foreign governments for the purpose of securing the cooperation of such foreign governments in controlling the export to countries and consignees to which the

Contents of
report.

50 USC 1701
note.

United States export controls apply of any goods or technology comparable to goods or technology controlled under this section.

(h) **INTERNATIONAL OBLIGATIONS.**—The provisions of subsections (b), (c), (d), (f), and (g) shall not apply in any case in which the President exercises the authority contained in this section to impose export controls, or to approve or deny export license applications, in order to fulfill obligations of the United States pursuant to treaties to which the United States is a party or pursuant to other international agreements.

(i) **COUNTRIES SUPPORTING INTERNATIONAL TERRORISM.**—The Secretary and the Secretary of State shall notify the Committee on Foreign Affairs of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate before any license is approved for the export of goods or technology valued at more than \$7,000,000 to any country concerning which the Secretary of State has made the following determinations:

Notification to congressional committees

(1) Such country has repeatedly provided support for acts of international terrorism.

(2) Such exports would make a significant contribution to the military potential of such country, including its military logistics capability, or would enhance the ability of such country to support acts of international terrorism.

(j) **CRIME CONTROL INSTRUMENTS.**—(1) Crime control and detection instruments and equipment shall be approved for export by the Secretary only pursuant to a validated export license.

(2) The provisions of this subsection shall not apply with respect to exports to countries which are members of the North Atlantic Treaty Organization or to Japan, Australia, or New Zealand, or to such other countries as the President shall designate consistent with the purposes of this subsection and section 502B of the Foreign Assistance Act of 1961.

22 USC 2304.

(k) **CONTROL LIST.**—The Secretary shall establish and maintain, as part of the commodity control list, a list of any goods or technology subject to export controls under this section, and the countries to which such controls apply. Such goods or technology shall be clearly identified as subject to controls under this section. Such list shall consist of goods and technology identified by the Secretary of State, with the concurrence of the Secretary. If the Secretary and the Secretary of State are unable to agree on the list, the matter shall be referred to the President. Such list shall be reviewed not less frequently than every three years in the case of controls maintained cooperatively with other countries, and annually in the case of all other controls, for the purpose of making such revisions as are necessary in order to carry out this section. During the course of such review, an assessment shall be made periodically of the availability from sources outside the United States, or any of its territories or possessions, of goods and technology comparable to those controlled for export from the United States under this section.

Periodical review.

SHORT SUPPLY CONTROLS

SEC. 7. (a) AUTHORITY.—(1) In order to carry out the policy set forth in section 3(2)(C) of this Act, the President may prohibit or curtail the export of any goods subject to the jurisdiction of the United States or exported by any person subject to the jurisdiction of the United States. In curtailing exports to carry out the policy set forth in section 3(2)(C) of this Act, the President shall allocate a portion of export licenses on the basis of factors other than a prior history of exportation. Such factors shall include the extent to which a country engages

50 USC app 2406.

Export licenses, allocation.

Publication in Federal Register.	<p>in equitable trade practices with respect to United States goods and treats the United States equitably in times of short supply.</p> <p>(2) Upon imposing quantitative restrictions on exports of any goods to carry out the policy set forth in section 3(2)(C) of this Act, the Secretary shall include in a notice published in the Federal Register with respect to such restrictions an invitation to all interested parties to submit written comments within 15 days from the date of publication on the impact of such restrictions and the method of licensing used to implement them.</p>
Fees.	<p>(3) In imposing export controls under this section, the President's authority shall include, but not be limited to, the imposition of export license fees.</p>
7 USC 612c-3.	<p>(b) MONITORING.—(1) In order to carry out the policy set forth in section 3(2)(C) of this Act, the Secretary shall monitor exports, and contracts for exports, of any good (other than a commodity which is subject to the reporting requirements of section 812 of the Agricultural Act of 1970) when the volume of such exports in relation to domestic supply contributes, or may contribute, to an increase in domestic prices or a domestic shortage, and such price increase or shortage has, or may have, a serious adverse impact on the economy or any sector thereof. Any such monitoring shall commence at a time adequate to assure that the monitoring will result in a data base sufficient to enable policies to be developed, in accordance with section 3(2)(C) of this Act, to mitigate a short supply situation or serious inflationary price rise or, if export controls are needed, to permit imposition of such controls in a timely manner. Information which the Secretary requires to be furnished in effecting such monitoring shall be confidential, except as provided in paragraph (2) of this subsection.</p>
Weekly or monthly reports	<p>(2) The results of such monitoring shall, to the extent practicable, be aggregated and included in weekly reports setting forth, with respect to each item monitored, actual and anticipated exports, the destination by country, and the domestic and worldwide price, supply, and demand. Such reports may be made monthly if the Secretary determines that there is insufficient information to justify weekly reports.</p> <p>(3) The Secretary shall consult with the Secretary of Energy to determine whether monitoring or export controls under this section are warranted with respect to exports of facilities, machinery, or equipment normally and principally used, or intended to be used, in the production, conversion, or transportation of fuels and energy (except nuclear energy), including, but not limited to, drilling rigs, platforms, and equipment; petroleum refineries, natural gas processing, liquefaction, and gasification plants; facilities for production of synthetic natural gas or synthetic crude oil; oil and gas pipelines, pumping stations, and associated equipment; and vessels for transporting oil, gas, coal, and other fuels.</p> <p>(c) PETITIONS FOR MONITORING OR CONTROLS.—(1)(A) Any entity, including a trade association, firm, or certified or recognized union or group of workers, which is representative of an industry or a substantial segment of an industry which processes metallic materials capable of being recycled with respect to which an increase in domestic prices or a domestic shortage, either of which results from increased exports, has or may have a significant adverse effect on the national economy or any sector thereof, may transmit a written petition to the Secretary requesting the monitoring of exports, or the imposition of export controls, or both, with respect to such material, in order to carry out the policy set forth in section 3(2)(C) of this Act.</p>

(B) Each petition shall be in such form as the Secretary shall prescribe and shall contain information in support of the action requested. The petition shall include any information reasonably available to the petitioner indicating (i) that there has been a significant increase, in relation to a specific period of time, in exports of such material in relation to domestic supply, and (ii) that there has been a significant increase in the price of such material or a domestic shortage of such material under circumstances indicating the price increase or domestic shortage may be related to exports.

(2) Within 15 days after receipt of any petition described in paragraph (1), the Secretary shall publish a notice in the Federal Register. The notice shall (A) include the name of the material which is the subject of the petition, (B) include the Schedule B number of the material as set forth in the Statistical Classification of Domestic and Foreign Commodities Exported from the United States, (C) indicate whether the petitioner is requesting that controls or monitoring, or both, be imposed with respect to the exportation of such material, and (D) provide that interested persons shall have a period of 30 days commencing with the date of publication of such notice to submit to the Secretary written data, views, or arguments, with or without opportunity for oral presentation, with respect to the matter involved. At the request of the petitioner or any other entity described in paragraph (1)(A) with respect to the material which is the subject of the petition, or at the request of any entity representative of producers or exporters of such material, the Secretary shall conduct public hearings with respect to the subject of the petition, in which case the 30-day period may be extended to 45 days.

Publication in
Federal
Register

Hearings

(3) Within 45 days after the end of the 30- or 45-day period described in paragraph (2), as the case may be, the Secretary shall—

(A) determine whether to impose monitoring or controls, or both, on the export of such material, in order to carry out the policy set forth in section 3(2)(C) of this Act; and

(B) publish in the Federal Register a detailed statement of the reasons for such determination.

Publication in
Federal
Register.
Publication in
Federal
Register.

(4) Within 15 days after making a determination under paragraph (3) to impose monitoring or controls on the export of a material, the Secretary shall publish in the Federal Register proposed regulations with respect to such monitoring or controls. Within 30 days following the publication of such proposed regulations, and after considering any public comments thereon, the Secretary shall publish and implement final regulations with respect to such monitoring or controls.

(5) For purposes of publishing notices in the Federal Register and scheduling public hearings pursuant to this subsection, the Secretary may consolidate petitions, and responses thereto, which involve the same or related materials.

Petitions.
consolidation

(6) If a petition with respect to a particular material or group of materials has been considered in accordance with all the procedures prescribed in this subsection, the Secretary may determine, in the absence of significantly changed circumstances, that any other petition with respect to the same material or group of materials which is filed within 6 months after consideration of the prior petition has been completed does not merit complete consideration under this subsection.

(7) The procedures and time limits set forth in this subsection with respect to a petition filed under this subsection shall take precedence over any review undertaken at the initiative of the Secretary with respect to the same subject as that of the petition.

Temporary
monitoring or
controls

(8) The Secretary may impose monitoring or controls on a temporary basis after a petition is filed under paragraph (1)(A) but before the Secretary makes a determination under paragraph (3) if the Secretary considers such action to be necessary to carry out the policy set forth in section 3(2)(C) of this Act.

(9) The authority under this subsection shall not be construed to affect the authority of the Secretary under any other provision of this Act.

(10) Nothing contained in this subsection shall be construed to preclude submission on a confidential basis to the Secretary of information relevant to a decision to impose or remove monitoring or controls under the authority of this Act, or to preclude consideration of such information by the Secretary in reaching decisions required under this subsection. The provisions of this paragraph shall not be construed to affect the applicability of section 552(b) of title 5, United States Code.

(d) DOMESTICALLY PRODUCED CRUDE OIL.—(1) Notwithstanding any other provision of this Act and notwithstanding subsection (u) of section 28 of the Mineral Leasing Act of 1920 (30 U.S.C. 185), no domestically produced crude oil transported by pipeline over right-of-way granted pursuant to section 203 of the Trans-Alaska Pipeline Authorization Act (43 U.S.C. 1652) (except any such crude oil which (A) is exported to an adjacent foreign country to be refined and consumed therein in exchange for the same quantity of crude oil being exported from that country to the United States; such exchange must result through convenience or increased efficiency of transportation in lower prices for consumers of petroleum products in the United States as described in paragraph (2)(A)(ii) of this subsection, or (B) is temporarily exported for convenience or increased efficiency of transportation across parts of an adjacent foreign country and reenters the United States) may be exported from the United States, or any of its territories and possessions, unless the requirements of paragraph (2) of this subsection are met.

Exportation,
conditions.

(2) Crude oil subject to the prohibition contained in paragraph (1) may be exported only if—

(A) the President makes and publishes express findings that exports of such crude oil, including exchanges—

(i) will not diminish the total quantity or quality of petroleum refined within, stored within, or legally committed to be transported to and sold within the United States;

(ii) will, within 3 months following the initiation of such exports or exchanges, result in (I) acquisition costs to the refiners which purchase the imported crude oil being lower than the acquisition costs such refiners would have to pay for the domestically produced oil in the absence of such an export or exchange, and (II) not less than 75 percent of such savings in costs being reflected in wholesale and retail prices of products refined from such imported crude oil;

(iii) will be made only pursuant to contracts which may be terminated if the crude oil supplies of the United States are interrupted, threatened, or diminished;

(iv) are clearly necessary to protect the national interest; and

(v) are in accordance with the provisions of this Act; and

(B) the President reports such findings to the Congress and the Congress, within 90 days thereafter, agrees to a concurrent resolution approving such exports on the basis of the findings.

(3) Notwithstanding any other provision of this section or any other provision of law, including subsection (u) of section 28 of the Mineral Leasing Act of 1920, the President may export oil to any country

Report to
Congress.

30 USC 185.

pursuant to a bilateral international oil supply agreement entered into by the United States with such nation before June 25, 1979, or to any country pursuant to the International Emergency Oil Sharing Plan of the International Energy Agency.

(e) **REFINED PETROLEUM PRODUCTS.**—(1) No refined petroleum product may be exported except pursuant to an export license specifically authorizing such export. Not later than 5 days after an application for a license to export any refined petroleum product or residual fuel oil is received, the Secretary shall notify the Congress of such application, together with the name of the exporter, the destination of the proposed export, and the amount and price of the proposed export. Such notification shall be made to the chairman of the Committee on Foreign Affairs of the House of Representatives and the chairman of the Committee on Banking, Housing, and Urban Affairs of the Senate.

Export license applications, notification of congressional committees

(2) The Secretary may not grant such license during the 30-day period beginning on the date on which notification to the Congress under paragraph (1) is received, unless the President certifies in writing to the Speaker of the House of Representatives and the President pro tempore of the Senate that the proposed export is vital to the national interest and that a delay in issuing the license would adversely affect that interest.

(3) This subsection shall not apply to (A) any export license application for exports to a country with respect to which historical export quotas established by the Secretary on the basis of past trading relationships apply, or (B) any license application for exports to a country if exports under the license would not result in more than 250,000 barrels of refined petroleum products being exported from the United States to such country in any fiscal year.

(4) For purposes of this subsection, "refined petroleum product" means gasoline, kerosene, distillates, propane or butane gas, diesel fuel, and residual fuel oil refined within the United States or entered for consumption within the United States.

"Refined petroleum product."

(5) The Secretary may extend any time period prescribed in section 10 of this Act to the extent necessary to take into account delays in action by the Secretary on a license application on account of the provisions of this subsection.

Time extension.

(f) **CERTAIN PETROLEUM PRODUCTS.**—Petroleum products refined in United States Foreign Trade Zones, or in the United States Territory of Guam, from foreign crude oil shall be excluded from any quantitative restrictions imposed under this section except that, if the Secretary finds that a product is in short supply, the Secretary may issue such regulations as may be necessary to limit exports.

Regulations

(g) **AGRICULTURAL COMMODITIES.**—(1) The authority conferred by this section shall not be exercised with respect to any agricultural commodity, including fats and oils or animal hides or skins, without the approval of the Secretary of Agriculture. The Secretary of Agriculture shall not approve the exercise of such authority with respect to any such commodity during any period for which the supply of such commodity is determined by the Secretary of Agriculture to be in excess of the requirements of the domestic economy except to the extent the President determines that such exercise of authority is required to carry out the policies set forth in subparagraph (A) or (B) of paragraph (2) of section 3 of this Act. The Secretary of Agriculture shall, by exercising the authorities which the Secretary of Agriculture has under other applicable provisions of law, collect data with respect to export sales of animal hides and skins.

Export sales of animal hides and skins, data

(2) Upon approval of the Secretary, in consultation with the Secretary of Agriculture, agricultural commodities purchased by or

Regulations.

for use in a foreign country may remain in the United States for export at a later date free from any quantitative limitations on export which may be imposed to carry out the policy set forth in section 3(2)(C) of this Act subsequent to such approval. The Secretary may not grant such approval unless the Secretary receives adequate assurance and, in conjunction with the Secretary of Agriculture, finds (A) that such commodities will eventually be exported, (B) that neither the sale nor export thereof will result in an excessive drain of scarce materials and have a serious domestic inflationary impact, (C) that storage of such commodities in the United States will not unduly limit the space available for storage of domestically owned commodities, and (D) that the purpose of such storage is to establish a reserve of such commodities for later use, not including resale to or use by another country. The Secretary may issue such regulations as may be necessary to implement this paragraph.

(3) If the authority conferred by this section or section 6 is exercised to prohibit or curtail the export of any agricultural commodity in order to carry out the policies set forth in subparagraph (B) or (C) of paragraph (2) of section 3 of this Act, the President shall immediately report such prohibition or curtailment to the Congress, setting forth the reasons therefor in detail. If the Congress, within 30 days after the date of its receipt of such report, adopts a concurrent resolution disapproving such prohibition or curtailment, then such prohibition or curtailment shall cease to be effective with the adoption of such resolution. In the computation of such 30-day period, there shall be excluded the days on which either House is not in session because of an adjournment of more than 3 days to a day certain or because of an adjournment of the Congress sine die.

(h) **BARTER AGREEMENTS.**—(1) The exportation pursuant to a barter agreement of any goods which may lawfully be exported from the United States, for any goods which may lawfully be imported into the United States, may be exempted, in accordance with paragraph (2) of this subsection, from any quantitative limitation on exports (other than any reporting requirement) imposed to carry out the policy set forth in section 3(2)(C) of this Act.

(2) The Secretary shall grant an exemption under paragraph (1) if the Secretary finds, after consultation with the appropriate department or agency of the United States, that—

(A) for the period during which the barter agreement is to be performed—

(i) the average annual quantity of the goods to be exported pursuant to the barter agreement will not be required to satisfy the average amount of such goods estimated to be required annually by the domestic economy and will be surplus thereto; and

(ii) the average annual quantity of the goods to be imported will be less than the average amount of such goods estimated to be required annually to supplement domestic production; and

(B) the parties to such barter agreement have demonstrated adequately that they intend, and have the capacity, to perform such barter agreement.

"Barter agreement."

(3) For purposes of this subsection, the term "barter agreement" means any agreement which is made for the exchange, without monetary consideration, of any goods produced in the United States for any goods produced outside of the United States.

(4) This subsection shall apply only with respect to barter agreements entered into after the effective date of this Act.

(i) **UNPROCESSED RED CEDAR.**—(1) The Secretary shall require a validated license, under the authority contained in subsection (a) of this section, for the export of unprocessed western red cedar (*Thuja plicata*) logs, harvested from State or Federal lands. The Secretary shall impose quantitative restrictions upon the export of unprocessed western red cedar logs during the 3-year period beginning on the effective date of this Act as follows:

(A) Not more than thirty million board feet scribner of such logs may be exported during the first year of such 3-year period.

(B) Not more than fifteen million board feet scribner of such logs may be exported during the second year of such period.

(C) Not more than five million board feet scribner of such logs may be exported during the third year of such period.

After the end of such 3-year period, no unprocessed western red cedar logs may be exported from the United States.

(2) The Secretary shall allocate export licenses to exporters pursuant to this subsection on the basis of a prior history of exportation by such exporters and such other factors as the Secretary considers necessary and appropriate to minimize any hardship to the producers of western red cedar and to further the foreign policy of the United States.

(3) Unprocessed western red cedar logs shall not be considered to be an agricultural commodity for purposes of subsection (g) of this section.

(4) As used in this subsection, the term "unprocessed western red cedar" means red cedar timber which has not been processed into—

(A) lumber without wane;

(B) chips, pulp, and pulp products;

(C) veneer and plywood;

(D) poles, posts, or pilings cut or treated with preservative for use as such and not intended to be further processed; or

(E) shakes and shingles.

(j) **EXPORT OF HORSES.**—(1) Notwithstanding any other provision of this Act, no horse may be exported by sea from the United States, or any of its territories and possessions, unless such horse is part of a consignment of horses with respect to which a waiver has been granted under paragraph (2) of this subsection.

(2) The Secretary, in consultation with the Secretary of Agriculture, may issue regulations providing for the granting of waivers permitting the export by sea of a specified consignment of horses, if the Secretary, in consultation with the Secretary of Agriculture, determines that no horse in that consignment is being exported for purposes of slaughter.

Export
terminations

Export licenses,
allocation.

"Unprocessed
western red
cedar."

Regulations.

FOREIGN BOYCOTTS

SEC. 8. (a) PROHIBITIONS AND EXCEPTIONS.—(1) For the purpose of implementing the policies set forth in subparagraph (A) or (B) of paragraph (5) of section 3 of this Act, the President shall issue regulations prohibiting any United States person, with respect to his activities in the interstate or foreign commerce of the United States, from taking or knowingly agreeing to take any of the following actions with intent to comply with, further, or support any boycott fostered or imposed by a foreign country against a country which is friendly to the United States and which is not itself the object of any form of boycott pursuant to United States law or regulation:

(A) Refusing, or requiring any other person to refuse, to do business with or in the boycotted country, with any business concern organized under the laws of the boycotted country, with

Regulations
50 USC app.
2047.

Employment
discrimination,
prohibition.

any national or resident of the boycotted country, or with any other person, pursuant to an agreement with, a requirement of, or a request from or on behalf of the boycotting country. The mere absence of a business relationship with or in the boycotted country with any business concern organized under the laws of the boycotted country, with any national or resident of the boycotted country, or with any other person, does not indicate the existence of the intent required to establish a violation of regulations issued to carry out this subparagraph.

(B) Refusing, or requiring any other person to refuse, to employ or otherwise discriminating against any United States person on the basis of race, religion, sex, or national origin of that person or of any owner, officer, director, or employee of such person.

(C) Furnishing information with respect to the race, religion, sex, or national origin of any United States person or of any owner, officer, director, or employee of such person.

Business
information.

(D) Furnishing information about whether any person has, has had, or proposes to have any business relationship (including a relationship by way of sale, purchase, legal or commercial representation, shipping or other transport, insurance, investment, or supply) with or in the boycotted country, with any business concern organized under the laws of the boycotted country, with any national or resident of the boycotted country, or with any other person which is known or believed to be restricted from having any business relationship with or in the boycotting country. Nothing in this paragraph shall prohibit the furnishing of normal business information in a commercial context as defined by the Secretary.

(E) Furnishing information about whether any person is a member of, has made contributions to, or is otherwise associated with or involved in the activities of any charitable or fraternal organization which supports the boycotted country.

Letter of credit.

(F) Paying, honoring, confirming, or otherwise implementing a letter of credit which contains any condition or requirement compliance with which is prohibited by regulations issued pursuant to this paragraph, and no United States person shall, as a result of the application of this paragraph, be obligated to pay or otherwise honor or implement such letter of credit.

Regulatory
exceptions.

(2) Regulations issued pursuant to paragraph (1) shall provide exceptions for—

(A) complying or agreeing to comply with requirements (i) prohibiting the import of goods or services from the boycotted country or goods produced or services provided by any business concern organized under the laws of the boycotted country or by nationals or residents of the boycotted country, or (ii) prohibiting the shipment of goods to the boycotting country on a carrier of the boycotted country, or by a route other than that prescribed by the boycotting country or the recipient of the shipment;

(B) complying or agreeing to comply with import and shipping document requirements with respect to the country of origin, the name of the carrier and route of shipment, the name of the supplier of the shipment or the name of the provider of other services, except that no information knowingly furnished or conveyed in response to such requirements may be stated in negative, blacklisting, or similar exclusionary terms, other than with respect to carriers or route of shipment as may be permitted by such regulations in order to comply with precautionary requirements protecting against war risks and confiscation;

(C) complying or agreeing to comply in the normal course of business with the unilateral and specific selection by a boycotting country, or national or resident thereof, of carriers, insurers, suppliers of services to be performed within the boycotting country or specific goods which, in the normal course of business, are identifiable by source when imported into the boycotting country;

(D) complying or agreeing to comply with export requirements of the boycotting country relating to shipments or transshipments of exports to the boycotted country, to any business concern of or organized under the laws of the boycotted country, or to any national or resident of the boycotted country;

(E) compliance by an individual or agreement by an individual to comply with the immigration or passport requirements of any country with respect to such individual or any member of such individual's family or with requests for information regarding requirements of employment of such individual within the boycotting country; and

(F) compliance by a United States person resident in a foreign country or agreement by such person to comply with the laws of that country with respect to his activities exclusively therein, and such regulations may contain exceptions for such resident complying with the laws or regulations of that foreign country governing imports into such country of trademarked, trade named, or similarly specifically identifiable products, or components of products for his own use, including the performance of contractual services within that country, as may be defined by such regulations.

(3) Regulations issued pursuant to paragraphs (2)(C) and (2)(F) shall not provide exceptions from paragraphs (1)(B) and (1)(C).

(4) Nothing in this subsection may be construed to supersede or limit the operation of the antitrust or civil rights laws of the United States.

(5) This section shall apply to any transaction or activity undertaken, by or through a United States person or any other person, with intent to evade the provisions of this section as implemented by the regulations issued pursuant to this subsection, and such regulations shall expressly provide that the exceptions set forth in paragraph (2) shall not permit activities or agreements (expressed or implied by a course of conduct, including a pattern of responses) otherwise prohibited, which are not within the intent of such exceptions.

(b) FOREIGN POLICY CONTROLS.—(1) In addition to the regulations issued pursuant to subsection (a) of this section, regulations issued under section 6 of this Act shall implement the policies set forth in section 3(5).

(2) Such regulations shall require that any United States person receiving a request for the furnishing of information, the entering into or implementing of agreements, or the taking of any other action referred to in section 3(5) shall report that fact to the Secretary, together with such other information concerning such request as the Secretary may require for such action as the Secretary considers appropriate for carrying out the policies of that section. Such person shall also report to the Secretary whether such person intends to comply and whether such person has complied with such request. Any report filed pursuant to this paragraph shall be made available promptly for public inspection and copying, except that information regarding the quantity, description, and value of any goods or technology to which such report relates may be kept confidential if the Secretary determines that disclosure thereof would place the

Reports.

Public inspection and copying.

Transmittal to
Secretary of
State

United States person involved at a competitive disadvantage. The Secretary shall periodically transmit summaries of the information contained in such reports to the Secretary of State for such action as the Secretary of State, in consultation with the Secretary, considers appropriate for carrying out the policies set forth in section 3(5) of this Act.

(c) **PREEMPTION.**—The provisions of this section and the regulations issued pursuant thereto shall preempt any law, rule, or regulation of any of the several States or the District of Columbia, or any of the territories or possessions of the United States, or of any governmental subdivision thereof, which law, rule, or regulation pertains to participation in, compliance with, implementation of, or the furnishing of information regarding restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries.

PROCEDURES FOR HARDSHIP RELIEF FROM EXPORT CONTROLS

50 USC app.
2408.

SEC. 9. (a) FILING OF PETITIONS.—Any person who, in such person's domestic manufacturing process or other domestic business operation, utilizes a product produced abroad in whole or in part from a good historically obtained from the United States but which has been made subject to export controls, or any person who historically has exported such a good, may transmit a petition of hardship to the Secretary requesting an exemption from such controls in order to alleviate any unique hardship resulting from the imposition of such controls. A petition under this section shall be in such form as the Secretary shall prescribe and shall contain information demonstrating the need for the relief requested.

(b) **DECISION OF THE SECRETARY.**—Not later than 30 days after receipt of any petition under subsection (a), the Secretary shall transmit a written decision to the petitioner granting or denying the requested relief. Such decision shall contain a statement setting forth the Secretary's basis for the grant or denial. Any exemption granted may be subject to such conditions as the Secretary considers appropriate.

(c) **FACTORS TO BE CONSIDERED.**—For purposes of this section, the Secretary's decision with respect to the grant or denial of relief from unique hardship resulting directly or indirectly from the imposition of export controls shall reflect the Secretary's consideration of factors such as the following:

(1) Whether denial would cause a unique hardship to the petitioner which can be alleviated only by granting an exception to the applicable regulations. In determining whether relief shall be granted, the Secretary shall take into account—

(A) ownership of material for which there is no practicable domestic market by virtue of the location or nature of the material;

(B) potential serious financial loss to the applicant if not granted an exception;

(C) inability to obtain, except through import, an item essential for domestic use which is produced abroad from the good under control;

(D) the extent to which denial would conflict, to the particular detriment of the applicant, with other national policies including those reflected in any international agreement to which the United States is a party;

(E) possible adverse effects on the economy (including unemployment) in any locality or region of the United States; and

(F) other relevant factors, including the applicant's lack of an exporting history during any base period that may be established with respect to export quotas for the particular good.

(2) The effect a finding in favor of the applicant would have on attainment of the basic objectives of the short supply control program.

In all cases, the desire to sell at higher prices and thereby obtain greater profits shall not be considered as evidence of a unique hardship, nor will circumstances where the hardship is due to imprudent acts or failure to act on the part of the petitioner.

PROCEDURES FOR PROCESSING EXPORT LICENSE APPLICATIONS

SEC. 10. (a) PRIMARY RESPONSIBILITY OF THE SECRETARY.—(1) All export license applications required under this Act shall be submitted by the applicant to the Secretary. All determinations with respect to any such application shall be made by the Secretary, subject to the procedures provided in this section.

50 USC app.
2409.

(2) It is the intent of the Congress that a determination with respect to any export license application be made to the maximum extent possible by the Secretary without referral of such application to any other department or agency of the Government.

(3) To the extent necessary, the Secretary shall seek information and recommendations from the Government departments and agencies concerned with aspects of United States domestic and foreign policies and operations having an important bearing on exports. Such departments and agencies shall cooperate fully in rendering such information and recommendations.

(b) INITIAL SCREENING.—Within 10 days after the date on which any export license application is submitted pursuant to subsection (a)(1), the Secretary shall—

(1) send the applicant an acknowledgment of the receipt of the application and the date of the receipt;

(2) submit to the applicant a written description of the procedures required by this section, the responsibilities of the Secretary and of other departments and agencies with respect to the application, and the rights of the applicant;

(3) return the application without action if the application is improperly completed or if additional information is required, with sufficient information to permit the application to be properly resubmitted, in which case if such application is resubmitted, it shall be treated as a new application for the purpose of calculating the time periods prescribed in this section;

(4) determine whether it is necessary to refer the application to any other department or agency and, if such referral is determined to be necessary, inform the applicant of any such department or agency to which the application will be referred; and

(5) determine whether it is necessary to submit the application to a multilateral review process, pursuant to a multilateral agreement, formal or informal, to which the United States is a party and, if so, inform the applicant of this requirement.

(c) ACTION ON CERTAIN APPLICATIONS.—In each case in which the Secretary determines that it is not necessary to refer an application to any other department or agency for its information and recommendations, a license shall be formally issued or denied within 90 days after a properly completed application has been submitted pursuant to this section.

(d) **REFERRAL TO OTHER DEPARTMENTS AND AGENCIES.**—In each case in which the Secretary determines that it is necessary to refer an application to any other department or agency for its information and recommendations, the Secretary shall, within 30 days after the submission of a properly completed application—

(1) refer the application, together with all necessary analysis and recommendations of the Department of Commerce, concurrently to all such departments or agencies; and

(2) if the applicant so requests, provide the applicant with an opportunity to review for accuracy any documentation to be referred to any such department or agency with respect to such application for the purpose of describing the export in question in order to determine whether such documentation accurately describes the proposed export.

(e) **ACTION BY OTHER DEPARTMENTS AND AGENCIES.**—(1) Any department or agency to which an application is referred pursuant to subsection (d) shall submit to the Secretary, within 30 days after its receipt of the application, the information or recommendations requested with respect to such application. Except as provided in paragraph (2), any such department or agency which does not submit its recommendations within the time period prescribed in the preceding sentence shall be deemed by the Secretary to have no objection to the approval of such application.

Recommendations,
time extension.

(2) If the head of any such department or agency notifies the Secretary before the expiration of the time period provided in paragraph (1) for submission of its recommendations that more time is required for review by such department or agency, such department or agency shall have an additional 30-day period to submit its recommendations to the Secretary. If such department or agency does not submit its recommendations within the time period prescribed by the preceding sentence, it shall be deemed by the Secretary to have no objection to the approval of such application.

Conflicting
recommendations.

(f) **ACTION BY THE SECRETARY.**—(1) Within 90 days after receipt of the recommendations of other departments and agencies with respect to a license application, as provided in subsection (e), the Secretary shall formally issue or deny the license. In deciding whether to issue or deny a license, the Secretary shall take into account any recommendation of a department or agency with respect to the application in question. In cases where the Secretary receives conflicting recommendations, the Secretary shall, within the 90-day period provided for in this subsection, take such action as may be necessary to resolve such conflicting recommendations.

Applicant
notification and
opportunity for
written
response.

(2) In cases where the Secretary receives questions or negative considerations or recommendations from any other department or agency with respect to an application, the Secretary shall, to the maximum extent consistent with the national security and foreign policy of the United States, inform the applicant of the specific questions raised and any such negative considerations or recommendations, and shall accord the applicant an opportunity, before the final determination with respect to the application is made, to respond in writing to such questions, considerations, or recommendations.

Applicant denial
procedures.

(3) In cases where the Secretary has determined that an application should be denied, the applicant shall be informed in writing, within 5 days after such determination is made, of the determination, of the statutory basis for denial, the policies set forth in section 3 of the Act which would be furthered by denial, and, to the extent consistent with the national security and foreign policy of the United States, the specific considerations which led to the denial, and of the availability

of appeal procedures. In the event decisions on license applications are deferred inconsistent with the provisions of this section, the applicant shall be so informed in writing within 5 days after such deferral.

(4) If the Secretary determines that a particular application or set of applications is of exceptional importance and complexity, and that additional time is required for negotiations to modify the application or applications, the Secretary may extend any time period prescribed in this section. The Secretary shall notify the Congress and the applicant of such extension and the reasons therefor.

Time extension,
notification to
Congress and
applicant.

(g) SPECIAL PROCEDURES FOR SECRETARY OF DEFENSE.—(1) Notwithstanding any other provision of this section, the Secretary of Defense is authorized to review any proposed export of any goods or technology to any country to which exports are controlled for national security purposes and, whenever the Secretary of Defense determines that the export of such goods or technology will make a significant contribution, which would prove detrimental to the national security of the United States, to the military potential of any such country, to recommend to the President that such export be disapproved.

Review.

(2) Notwithstanding any other provision of law, the Secretary of Defense shall determine, in consultation with the Secretary, and confirm in writing the types and categories of transactions which should be reviewed by the Secretary of Defense in order to make a determination referred to in paragraph (1). Whenever a license or other authority is requested for the export to any country to which exports are controlled for national security purposes of goods or technology within any such type or category, the Secretary shall notify the Secretary of Defense of such request, and the Secretary may not issue any license or other authority pursuant to such request before the expiration of the period within which the President may disapprove such export. The Secretary of Defense shall carefully consider any notification submitted by the Secretary pursuant to this paragraph and, not later than 30 days after notification of the request, shall—

Export
transactions,
review.

(A) recommend to the President that he disapprove any request for the export of the goods or technology involved to the particular country if the Secretary of Defense determines that the export of such goods or technology will make a significant contribution, which would prove detrimental to the national security of the United States, to the military potential of such country or any other country;

(B) notify the Secretary that he would recommend approval subject to specified conditions; or

(C) recommend to the Secretary that the export of goods or technology be approved.

If the President notifies the Secretary, within 30 days after receiving a recommendation from the Secretary of Defense, that he disapproves such export, no license or other authority may be issued for the export of such goods or technology to such country.

(3) The Secretary shall approve or disapprove a license application, and issue or deny a license, in accordance with the provisions of this subsection, and, to the extent applicable, in accordance with the time periods and procedures otherwise set forth in this section.

(4) Whenever the President exercises his authority under this subsection to modify or overrule a recommendation made by the Secretary of Defense or exercises his authority to modify or overrule any recommendation made by the Secretary of Defense under subsection (c) or (d) of section 5 of this Act with respect to the list of goods and technologies controlled for national security purposes, the Presi-

Presidential
statement,
transmittal to
Congress.

dent shall promptly transmit to the Congress a statement indicating his decision, together with the recommendation of the Secretary of Defense.

Multilateral
review process.

(h) **MULTILATERAL CONTROLS.**—In any case in which an application, which has been finally approved under subsection (c), (f), or (g) of this section, is required to be submitted to a multilateral review process, pursuant to a multilateral agreement, formal or informal, to which the United States is a party, the license shall not be issued as prescribed in such subsections, but the Secretary shall notify the applicant of the approval of the application (and the date of such approval) by the Secretary subject to such multilateral review. The license shall be issued upon approval of the application under such multilateral review. If such multilateral review has not resulted in a determination with respect to the application within 60 days after such date, the Secretary's approval of the license shall be final and the license shall be issued, unless the Secretary determines that issuance of the license would prove detrimental to the national security of the United States. At the time at which the Secretary makes such a determination, the Secretary shall notify the applicant of the determination and shall notify the Congress of the determination, the reasons for the determination, the reasons for which the multilateral review could not be concluded within such 60-day period, and the actions planned or being taken by the United States Government to secure conclusion of the multilateral review. At the end of every 60-day period after such notification to Congress, the Secretary shall advise the applicant and the Congress of the status of the application, and shall report to the Congress in detail on the reasons for the further delay and any further actions being taken by the United States Government to secure conclusion of the multilateral review. In addition, at the time at which the Secretary issues or denies the license upon conclusion of the multilateral review, the Secretary shall notify the Congress of such issuance or denial and of the total time required for the multilateral review.

Notification to
Congress and
applicant.

Applicant status,
report to
Congress.

(i) **RECORDS.**—The Secretary and any department or agency to which any application is referred under this section shall keep accurate records with respect to all applications considered by the Secretary or by any such department or agency, including, in the case of the Secretary, any dissenting recommendations received from any such department or agency.

(j) **APPEAL AND COURT ACTION.**—(1) The Secretary shall establish appropriate procedures for any applicant to appeal to the Secretary the denial of an export license application of the applicant.

Filing of petition
by applicant.

(2) In any case in which any action prescribed in this section is not taken on a license application within the time periods established by this section (except in the case of a time period extended under subsection (f)(4) of which the applicant is notified), the applicant may file a petition with the Secretary requesting compliance with the requirements of this section. When such petition is filed, the Secretary shall take immediate steps to correct the situation giving rise to the petition and shall immediately notify the applicant of such steps.

(3) If, within 30 days after a petition is filed under paragraph (2), the processing of the application has not been brought into conformity with the requirements of this section, or the application has been brought into conformity with such requirements but the Secretary has not so notified the applicant, the applicant may bring an action in an appropriate United States district court for a restraining order, a temporary or permanent injunction, or other appropriate relief, to require compliance with the requirements of this section. The United

States district courts shall have jurisdiction to provide such relief, as appropriate.

VIOLATIONS

SEC. 11. (a) IN GENERAL.—Except as provided in subsection (b) of this section, whoever knowingly violates any provision of this Act or any regulation, order, or license issued thereunder shall be fined not more than five times the value of the exports involved or \$50,000, whichever is greater, or imprisoned not more than 5 years, or both.

50 USC app
2410.

(b) WILLFUL VIOLATIONS.—(1) Whoever willfully exports anything contrary to any provision of this Act or any regulation, order, or license issued thereunder, with knowledge that such exports will be used for the benefit of any country to which exports are restricted for national security or foreign policy purposes, shall be fined not more than five times the value of the exports involved or \$100,000, whichever is greater, or imprisoned not more than 10 years, or both.

(2) Any person who is issued a validated license under this Act for the export of any good or technology to a controlled country and who, with knowledge that such a good or technology is being used by such controlled country for military or intelligence gathering purposes contrary to the conditions under which the license was issued, willfully fails to report such use to the Secretary of Defense, shall be fined not more than five times the value of the exports involved or \$100,000, whichever is greater, or imprisoned for not more than 5 years, or both. For purposes of this paragraph, "controlled country" means any country described in section 620(f) of the Foreign Assistance Act of 1961.

"Controlled
country."
22 USC 2370.

(c) CIVIL PENALTIES; ADMINISTRATIVE SANCTIONS.—(1) The head of any department or agency exercising any functions under this Act, or any officer or employee of such department or agency specifically designated by the head thereof, may impose a civil penalty not to exceed \$10,000 for each violation of this Act or any regulation, order, or license issued under this Act, either in addition to or in lieu of any other liability or penalty which may be imposed.

(2)(A) The authority under this Act to suspend or revoke the authority of any United States person to export goods or technology may be used with respect to any violation of the regulations issued pursuant to section 8(a) of this Act.

(B) Any administrative sanction (including any civil penalty or any suspension or revocation of authority to export) imposed under this Act for a violation of the regulations issued pursuant to section 8(a) of this Act may be imposed only after notice and opportunity for an agency hearing on the record in accordance with sections 554 through 557 of title 5, United States Code.

(C) Any charging letter or other document initiating administrative proceedings for the imposition of sanctions for violations of the regulations issued pursuant to section 8(a) of this Act shall be made available for public inspection and copying.

(d) PAYMENT OF PENALTIES.—The payment of any penalty imposed pursuant to subsection (c) may be made a condition, for a period not exceeding one year after the imposition of such penalty, to the granting, restoration, or continuing validity of any export license, permission, or privilege granted or to be granted to the person upon whom such penalty is imposed. In addition, the payment of any penalty imposed under subsection (c) may be deferred or suspended in whole or in part for a period of time no longer than any probation period (which may exceed one year) that may be imposed upon such person. Such a deferral or suspension shall not operate as a bar to the

Deferral or
suspension.

collection of the penalty in the event that the conditions of the suspension, deferral, or probation are not fulfilled.

(e) **REFUNDS.**—Any amount paid in satisfaction of any penalty imposed pursuant to subsection (c) shall be covered into the Treasury as a miscellaneous receipt. The head of the department or agency concerned may, in his discretion, refund any such penalty, within 2 years after payment, on the ground of a material error of fact or law in the imposition of the penalty. Notwithstanding section 1346(a) of title 28, United States Code, no action for the refund of any such penalty may be maintained in any court.

(f) **ACTIONS FOR RECOVERY OF PENALTIES.**—In the event of the failure of any person to pay a penalty imposed pursuant to subsection (c), a civil action for the recovery thereof may, in the discretion of the head of the department or agency concerned, be brought in the name of the United States. In any such action, the court shall determine de novo all issues necessary to the establishment of liability. Except as provided in this subsection and in subsection (d), no such liability shall be asserted, claimed, or recovered upon by the United States in any way unless it has previously been reduced to judgment.

(g) **OTHER AUTHORITIES.**—Nothing in subsection (c), (d), or (f) limits—

(1) the availability of other administrative or judicial remedies with respect to violations of this Act, or any regulation, order, or license issued under this Act;

(2) the authority to compromise and settle administrative proceedings brought with respect to violations of this Act, or any regulation, order, or license issued under this Act; or

(3) the authority to compromise, remit or mitigate seizures and forfeitures pursuant to section 1(b) of title VI of the Act of June 15, 1917 (22 U.S.C. 401(b)).

ENFORCEMENT

50 USC app.
2411.

50 USC app. 2021
note, 2401 note.

SEC. 12. (a) GENERAL AUTHORITY.—To the extent necessary or appropriate to the enforcement of this Act or to the imposition of any penalty, forfeiture, or liability arising under the Export Control Act of 1949 or the Export Administration Act of 1969, the head of any department or agency exercising any function thereunder (and officers or employees of such department or agency specifically designated by the head thereof) may make such investigations and obtain such information from, require such reports or the keeping of such records by, make such inspection of the books, records, and other writings, premises, or property of, and take the sworn testimony of, any person. In addition, such officers or employees may administer oaths or affirmations, and may by subpoena require any person to appear and testify or to appear and produce books, records, and other writings, or both, and in the case of contumacy by, or refusal to obey a subpoena issued to, any such person, the district court of the United States for any district in which such person is found or resides or transacts business, upon application, and after notice to any such person and hearing, shall have jurisdiction to issue an order requiring such person to appear and give testimony or to appear and produce books, records, and other writings, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(b) **IMMUNITY.**—No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of section 6002 of

title 18, United States Code, shall apply with respect to any individual who specifically claims such privilege.

(c) **CONFIDENTIALITY.**—(1) Except as otherwise provided by the third sentence of section 8(b)(2) and by section 11(c)(2)(C) of this Act, information obtained under this Act on or before June 30, 1980, which is deemed confidential, including Shippers' Export Declarations, or with reference to which a request for confidential treatment is made by the person furnishing such information, shall be exempt from disclosure under section 552 of title 5, United States Code, and such information shall not be published or disclosed unless the Secretary determines that the withholding thereof is contrary to the national interest. Information obtained under this Act after June 30, 1980, may be withheld only to the extent permitted by statute, except that information obtained for the purpose of consideration of, or concerning, license applications under this Act shall be withheld from public disclosure unless the release of such information is determined by the Secretary to be in the national interest. Enactment of this subsection shall not affect any judicial proceeding commenced under section 552 of title 5, United States Code, to obtain access to boycott reports submitted prior to October 31, 1976, which was pending on May 15, 1979; but such proceeding shall be continued as if this Act had not been enacted.

Information disclosure.

Access to boycott reports.

(2) Nothing in this Act shall be construed as authorizing the withholding of information from the Congress, and all information obtained at any time under this Act or previous Acts regarding the control of exports, including any report or license application required under this Act, shall be made available upon request to any committee or subcommittee of Congress of appropriate jurisdiction. No such committee or subcommittee shall disclose any information obtained under this Act or previous Acts regarding the control of exports which is submitted on a confidential basis unless the full committee determines that the withholding thereof is contrary to the national interest.

Information, availability to Congress.

(d) **REPORTING REQUIREMENTS.**—In the administration of this Act, reporting requirements shall be so designed as to reduce the cost of reporting, recordkeeping, and export documentation required under this Act to the extent feasible consistent with effective enforcement and compilation of useful trade statistics. Reporting, recordkeeping, and export documentation requirements shall be periodically reviewed and revised in the light of developments in the field of information technology.

(e) **SIMPLIFICATION OF REGULATIONS.**—The Secretary, in consultation with appropriate United States Government departments and agencies and with appropriate technical advisory committees established under section 5(h), shall review the regulations issued under this Act and the commodity control list in order to determine how compliance with the provisions of this Act can be facilitated by simplifying such regulations, by simplifying or clarifying such list, or by any other means.

Review of regulations.

EXEMPTION FROM CERTAIN PROVISIONS RELATING TO ADMINISTRATIVE PROCEDURE AND JUDICIAL REVIEW

SEC. 13. (a) EXEMPTION.—Except as provided in section 11(c)(2), the functions exercised under this Act are excluded from the operation of sections 551, 553 through 559, and 701 through 706 of title 5, United States Code.

50 USC app. 2412.

(b) **PUBLIC PARTICIPATION.**—It is the intent of the Congress that, to the extent practicable, all regulations imposing controls on exports

under this Act be issued in proposed form with meaningful opportunity for public comment before taking effect. In cases where a regulation imposing controls under this Act is issued with immediate effect, it is the intent of the Congress that meaningful opportunity for public comment also be provided and that the regulation be reissued in final form after public comments have been fully considered.

ANNUAL REPORT

Report to
Congress.
50 USC app.
2413.

SEC. 14. (a) CONTENTS.—Not later than December 31 of each year, the Secretary shall submit to the Congress a report on the administration of this Act during the preceding fiscal year. All agencies shall cooperate fully with the Secretary in providing information for such report. Such report shall include detailed information with respect to—

- (1) the implementation of the policies set forth in section 3;
- (2) general licensing activities under sections 5, 6, and 7, and any changes in the exercise of the authorities contained in sections 5(a), 6(a), and 7(a);
- (3) the results of the review of United States policy toward individual countries pursuant to section 5(b);
- (4) the results, in as much detail as may be included consistent with the national security and the need to maintain the confidentiality of proprietary information, of the actions, including reviews and revisions of export controls maintained for national security purposes, required by section 5(c)(3);
- (5) actions taken to carry out section 5(d);
- (6) changes in categories of items under export control referred to in section 5(e);
- (7) determinations of foreign availability made under section 5(f), the criteria used to make such determinations, the removal of any export controls under such section, and any evidence demonstrating a need to impose export controls for national security purposes notwithstanding foreign availability;
- (8) actions taken in compliance with section 5(f)(5);
- (9) the operation of the indexing system under section 5(g);
- (10) consultations with the technical advisory committees established pursuant to section 5(h), the use made of the advice rendered by such committees, and the contributions of such committees toward implementing the policies set forth in this Act;
- (11) the effectiveness of export controls imposed under section 6 in furthering the foreign policy of the United States;
- (12) export controls and monitoring under section 7;
- (13) the information contained in the reports required by section 7(b)(2), together with an analysis of—
 - (A) the impact on the economy and world trade of shortages or increased prices for commodities subject to monitoring under this Act or section 812 of the Agricultural Act of 1970;
 - (B) the worldwide supply of such commodities; and
 - (C) actions being taken by other countries in response to such shortages or increased prices;
- (14) actions taken by the President and the Secretary to carry out the antiboycott policies set forth in section 3(5) of this Act;
- (15) organizational and procedural changes undertaken in furtherance of the policies set forth in this Act, including changes to increase the efficiency of the export licensing process and to fulfill the requirements of section 10, including an

7 USC 612c-3.

analysis of the time required to process license applications, the number and disposition of export license applications taking more than 90 days to process, and an accounting of appeals received, court orders issued, and actions taken pursuant thereto under subsection (j) of such section;

(16) delegations of authority by the President as provided in section 4(e) of this Act;

(17) efforts to keep the business sector of the Nation informed with respect to policies and procedures adopted under this Act;

(18) any reviews undertaken in furtherance of the policies of this Act, including the results of the review required by section 12(d), and any action taken, on the basis of the review required by section 12(e), to simplify regulations issued under this Act;

(19) violations under section 11 and enforcement activities under section 12; and

(20) the issuance of regulations under the authority of this Act, including an explanation of each case in which regulations were not issued in accordance with the first sentence of section 13(b).

(b) **REPORT ON CERTAIN EXPORT CONTROLS.**—To the extent that the President determines that the policies set forth in section 3 of this Act require the control of the export of goods and technology other than those subject to multilateral controls, or require more stringent controls than the multilateral controls, the President shall include in each annual report the reasons for the need to impose, or to continue to impose, such controls and the estimated domestic economic impact on the various industries affected by such controls.

(c) **REPORT ON NEGOTIATIONS.**—The President shall include in each annual report a detailed report on the progress of the negotiations required by section 5(i), until such negotiations are concluded.

REGULATORY AUTHORITY

SEC. 15. The President and the Secretary may issue such regulations as are necessary to carry out the provisions of this Act. Any such regulations issued to carry out the provisions of section 5(a), 6(a), 7(a), or 8(b) may apply to the financing, transporting, or other servicing of exports and the participation therein by any person.

Regulations.
50 USC app.
2414.

DEFINITIONS

SEC. 16. As used in this Act—

(1) the term “person” includes the singular and the plural and any individual, partnership, corporation, or other form of association, including any government or agency thereof;

(2) the term “United States person” means any United States resident or national (other than an individual resident outside the United States and employed by other than a United States person), any domestic concern (including any permanent domestic establishment of any foreign concern) and any foreign subsidiary or affiliate (including any permanent foreign establishment) of any domestic concern which is controlled in fact by such domestic concern, as determined under regulations of the President;

(3) the term “good” means any article, material, supply or manufactured product, including inspection and test equipment, and excluding technical data;

(4) the term “technology” means the information and know-how that can be used to design, produce, manufacture, utilize, or

50 USC app.
2415.

reconstruct goods, including computer software and technical data, but not the goods themselves; and
 (5) the term "Secretary" means the Secretary of Commerce.

EFFECT ON OTHER ACTS

50 USC app.
2416

SEC. 17. (a) IN GENERAL.—Nothing contained in this Act shall be construed to modify, repeal, supersede, or otherwise affect the provisions of any other laws authorizing control over exports of any commodity.

(b) COORDINATION OF CONTROLS.—The authority granted to the President under this Act shall be exercised in such manner as to achieve effective coordination with the authority exercised under section 38 of the Arms Export Control Act (22 U.S.C. 2778).

22 USC 2370.

(c) CIVIL AIRCRAFT EQUIPMENT.—Notwithstanding any other provision of law, any product (1) which is standard equipment, certified by the Federal Aviation Administration, in civil aircraft and is an integral part of such aircraft, and (2) which is to be exported to a country other than a controlled country, shall be subject to export controls exclusively under this Act. Any such product shall not be subject to controls under section 38(b)(2) of the Arms Export Control Act. For purposes of this subsection, the term "controlled country" means any country described in section 620(f) of the Foreign Assistance Act of 1961.

(d) NONPROLIFERATION CONTROLS.—(1) Nothing in section 5 or 6 of this Act shall be construed to supersede the procedures published by the President pursuant to section 309(c) of the Nuclear Non-Proliferation Act of 1978.

92 Stat. 141.
42 USC 2139.

(2) With respect to any export license application which, under the procedures published by the President pursuant to section 309(c) of the Nuclear Non-Proliferation Act of 1978, is referred to the Subgroup on Nuclear Export Coordination or other interagency group, the provisions of section 10 of this Act shall apply with respect to such license application only to the extent that they are consistent with such published procedures, except that if the processing of any such application under such procedures is not completed within 180 days after the receipt of the application by the Secretary, the applicant shall have the rights of appeal and court action provided in section 10(j) of this Act.

(e) TERMINATION OF OTHER AUTHORITY.—On October 1, 1979, the Mutual Defense Assistance Control Act of 1951 (22 U.S.C. 1611-1613d), is superseded.

AUTHORIZATION OF APPROPRIATIONS

50 USC app.
2417.

SEC. 18. (a) REQUIREMENT OF AUTHORIZING LEGISLATION.—Notwithstanding any other provision of law, no appropriation shall be made under any law to the Department of Commerce for expenses to carry out the purposes of this Act unless previously and specifically authorized by law.

(b) AUTHORIZATION.—There are authorized to be appropriated to the Department of Commerce to carry out the purposes of this Act—

(1) \$8,000,000 for each of the fiscal years 1980 and 1981, of which \$1,250,000 shall be available for each such fiscal year only for purposes of carrying out foreign availability assessments pursuant to section 5(f)(5), and

(2) such additional amounts, for each such fiscal year, as may be necessary for increases in salary, pay, retirement, other

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employee benefits authorized by law, and other nondiscretionary costs.

EFFECTIVE DATE

SEC. 19. (a) EFFECTIVE DATE.—This Act shall take effect upon the expiration of the Export Administration Act of 1969.

50 USC app.
2418.

(b) ISSUANCE OF REGULATIONS.—(1) Regulations implementing the provisions of section 10 of this Act shall be issued and take effect not later than July 1, 1980.

50 USC app. 2401
note.
50 USC app. 2409
note.

(2) Regulations implementing the provisions of section 7(c) of this Act shall be issued and take effect not later than January 1, 1980.

50 USC app. 2406
note.

TERMINATION DATE

SEC. 20. The authority granted by this Act terminates on September 30, 1983, or upon any prior date which the President by proclamation may designate.

50 USC app.
2419.

SAVINGS PROVISIONS

SEC. 21. (a) IN GENERAL.—All delegations, rules, regulations, orders, determinations, licenses, or other forms of administrative action which have been made, issued, conducted, or allowed to become effective under the Export Control Act of 1949 or the Export Administration Act of 1969 and which are in effect at the time this Act takes effect shall continue in effect according to their terms until modified, superseded, set aside, or revoked under this Act.

50 USC app.
2420.

(b) ADMINISTRATIVE PROCEEDINGS.—This Act shall not apply to any administrative proceedings commenced or any application for a license made, under the Export Administration Act of 1969, which is pending at the time this Act takes effect.

50 USC app. 2021
note.

TECHNICAL AMENDMENTS

SEC. 22. (a) Section 38(e) of the Arms Export Control Act (22 U.S.C. 2778(e)) is amended by striking out "sections 6(c), (d), (e), and (f) and 7(a) and (c) of the Export Administration Act of 1969" and inserting in lieu thereof "subsections (c), (d), (e), and (f) of section 11 of the Export Administration Act of 1979, and by subsections (a) and (c) of section 12 of such Act".

(b)(1) Section 103(c) of the Energy Policy and Conservation Act (42 U.S.C. 6212(c)) is amended—

(A) by striking out "1969" and inserting in lieu thereof "1979"; and

(B) by striking out "(A)" and inserting in lieu thereof "(C)".

(2) Section 254(e)(3) of such Act (42 U.S.C. 6274(e)(3)) is amended by striking out "section 7 of the Export Administration Act of 1969" and inserting in lieu thereof "section 12 of the Export Administration Act of 1979".

(c) Section 993(c)(2)(D) of the Internal Revenue Code of 1954 (26 U.S.C. 993(c)(2)(D)) is amended—

(1) by striking out "4(b) of the Export Administration Act of 1969 (50 U.S.C. App. 2403(b))" and inserting in lieu thereof "7(a) of the Export Administration Act of 1979"; and

(2) by striking out "(A)" and inserting in lieu thereof "(C)".

INTERNATIONAL INVESTMENT SURVEY ACT AUTHORIZATIONS

SEC. 23. (a) Section 9 of the International Investment Survey Act of 1976 (22 U.S.C. 3108) is amended to read as follows:

"AUTHORIZATIONS

"Sec. 9. To carry out this Act, there are authorized to be appropriated \$4,400,000 for the fiscal year ending September 30, 1980, and \$4,500,000 for the fiscal year ending September 30, 1981."

(b) The amendment made by subsection (a) shall take effect on October 1, 1979.

Effective date.
22 USC 3108
note.

MISCELLANEOUS

7 USC 1732.

SEC. 24. Section 402 of the Agricultural Trade Development and Assistance Act of 1954 is amended by inserting "or beer" in the second sentence immediately after "wine".

Approved September 29, 1979.

LEGISLATIVE HISTORY:

HOUSE REPORTS: No. 96-200 accompanying H.R. 4034 (Comm. on Foreign Affairs) and No. 96-482 (Comm. of Conference).

SENATE REPORT No. 96-169 (Comm. on Banking, Housing, and Urban Affairs).

CONGRESSIONAL RECORD, Vol. 125 (1979):

July 18, 20, 21, considered and passed Senate.

May 31, July 23, Sept. 11, 18, 21, 25, H.R. 4034 considered and passed House; passage vacated and S. 737, amended, passed in lieu.

Sept. 27, Senate agreed to conference report.

Sept 28, House agreed to conference report.

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Bingham, Jonathan D., and Victor Johnson.
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